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No. D

In The

Supreme Court of the United States

GERALD J. BRANKER, WARDEN, CENTRAL PRISON, RALEIGH, NORTH CAROLINA, *Petitioner*,

v.

WILLIAM ROBERT GRAY, JR., *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

I. Has the Fourth Circuit's expansive interpretation of this Court's opinions in *Wiggins v. Smith*, *Rompilla v. Beard*, and *Williams v. Taylor* denied the North Carolina state courts the deference their decisions are due under 28 U.S.C. § 2254(d) and (e) and supplanted the deference due counsel's decisions under *Strickland* with an ABA Guidelines no-stone-unturned standard for investigations in every capital case?

II. Are a state court's findings that an expert was not credible because of an insufficient factual basis and that trial counsel's judgment that mental health defenses and a defense of accident might seem inconsistent to a jury the kind of reasonable decisions based upon the evidence before the state court that are entitled to deference under *Strickland* and 28 U.S.C. § 2254(d) and (e)?

III. Can a defendant who is able to and does retain counsel and who refuses to pay for mental health expert assistance subsequently claim ineffective assistance of counsel for failure to retain and employ such an expert?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gerald J. Branker, Warden, Central Prison, Raleigh, North Carolina, by and through Roy Cooper, Attorney General of North Carolina, and Steven M. Arbogast, Special Deputy Attorney General, respectfully prays that this Court issue a writ of certiorari to review an Opinion and Order of the United States Court of Appeals for the Fourth Circuit.

OPINIONS AND ORDERS BELOW

Appended hereto, pursuant to U.S. Sup. Ct. R. 14.1(i) are (1) the June 24, 2008, Opinion by the United States Court of Appeals for the Fourth Circuit in *Gray v. Branker*, 529 F.3d 220 (4th Cir. 2008) (Pet. App. 1a); (2) the March 28, 2006, Order of the United States District Court for the Eastern District of North Carolina (Pet. App. 80a); (3) the November 30, 2006, Order of the Eastern District's denying a motion to alter or amend (Pet. App. 112a); (4) the December 13, 2000, Order of the Superior Court, Lenoir County, North Carolina, denying Gray's state court Motion for Appropriate Relief (Pet. App. 125a); and (5) the July 28, 2008, Order of the Fourth Circuit denying Branker's petition for rehearing and rehearing *en banc* (Pet. App. 183a).

JURISDICTION

The jurisdiction of this Court to review the Fourth Circuit's decision of June 24, 2008, is invoked pursuant to 28 U.S.C. § 1254(1). The Fourth Circuit denied the State's petition for rehearing and rehearing *en banc* on July 28, 2008.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI of the Constitution of the United States provides as follows:

> **AMENDMENT VI.**
>
> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Subsection 2254(d) of Title 28 of the United States Code provides as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless adjudication of the claim --

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Subsection 2254(e)(1) of Title 28 of the United States Code provides as follows:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

A. Procedural History

On November 24, 1992, Gray knocked his estranged wife to the ground in the driveway of their marital home. Then, while sitting upon his wife's

chest, Gray shot his wife in the head. The murder of Roslyn Gray culminated a bitter divorce fight. On May 10, 1993, Gray was indicted by a Lenoir County grand jury for the first-degree murder of his wife, Roslyn Gray. Gray was tried capitally before a jury at the November 1, 1993, Criminal Session of Superior Court, Lenoir County, the Honorable Paul M. Wright, Judge presiding. On December 10, 1993, the jury found Gray guilty as charged. After a sentencing hearing pursuant to N.C. Gen. Stat. § 15A-2000, the jury recommended a sentence of death, which the trial court duly imposed on December 15, 1993.

1. STATE APPELLATE REVIEW

On October 3, 1997, the Supreme Court of North Carolina affirmed Gray's conviction and sentence. *State v. Gray*, 347 N.C. 143, 491 S.E.2d 538 (1997). This Court denied certiorari on March 23, 1998. *Gray v. North Carolina*, 523 U.S. 1031 (1998).

2. STATE POST-CONVICTION REVIEW

On March 5, 1999, Gray timely filed a state court post-conviction motion for appropriate relief ("MAR") in Lenoir County Superior Court. Gray alleged various claims of ineffective assistance of trial counsel, in particular, that his trial counsel were ineffective in failing to engage an expert to assist in investigating, developing, and presenting mental health evidence in mitigation at sentencing.

Following a July 21-22, 1999, state court evidentiary hearing held pursuant to N.C. Gen. Stat.

§ 15A-1420 on Gray's MAR claims, the state superior court denied Gray's MAR. The court entered a written Order denying Gray's MAR on December 13, 2000. (Pet. App. 125a.) The evidence presented during the evidentiary hearing established that Gray was a well-educated, wealthy, medical professional. Gray had no past criminal record, nor did he have any evidence or record of mental health problems. When Gray's wife left Gray and commenced divorce proceedings, Gray intimidated, harassed, stalked, and abused his estranged wife, Roslyn, for weeks prior to murdering her. Gray closed bank accounts and shifted money to cut off his estranged wife from access to all funds and marital assets. Roslyn Gray was murdered in the driveway of the Gray residence as she returned the couple's children from a weekend visit. Gray knocked his wife to the driveway of their home, sat astride her, and shot her point-blank in the head. After shooting his wife in the head, Gray ran inside his home and used his children in an attempt to concoct an alibi.

Gray immediately retained counsel Robert Worthington, who represented Gray from the time of his initial apprehension. Worthington found Gray to be competent, coherent, and able to assist in the defense from the beginning. Worthington found nothing unusual about Gray's being depressed in the days and weeks immediately following his arrest for the murder of his wife. Within a few weeks of the murder, Worthington sought a mental health evaluation for Gray at Dorothea Dix Hospital. Dr. Patricio Lara determined that Gray was under stress and exhibited an adjustment disorder with disturbed emotions. Dr. Lara found no psychosis or

impairment in Gray's ability to understand his situation and no evidence that Gray's ability to distinguish right from wrong or to understand the nature of his actions at the time of the murder was impaired. Based upon the evaluation and his interaction with Gray, Worthington did not pursue a mental health defense. Worthington did wish to retain a mental health professional as a stand-by precaution. However, Worthington was retained counsel, and Gray refused to authorize funds for any mental health expert. Gray subsequently retained a second counsel, Dal Wooten. Wooten concurred in the assessment that Gray was attentive, cooperative, and able to assist in the defense.

At the evidentiary hearing, the testimony of Gray's post-conviction mental health expert, Dr. James Bellard, was not determined to be compelling. Dr. Bellard examined Gray six years after the murder and had not interviewed individuals who could shed light on Gray's behavior prior to the marital breakdown or during the weeks prior to Roslyn Gray's murder. With minimal exception, Dr. Bellard had not reviewed the trial transcript, which contained testimony regarding Gray's conduct and observations of those who had contact with Gray prior to the murder. The state post-conviction court further found that Gray was not indigent at the time of his trial. Gray had two retained counsel and refused to authorize any funds for mental health experts or defense.

On February 6, 2001, Gray filed a petition for writ of certiorari ("PWC") in the Supreme Court of North

Carolina seeking review of the superior court Order denying his MAR. On May 9, 2002, the North Carolina Supreme Court denied Gray's PWC. *State v. Gray*, 355 N.C. 496, 564 S.E.2d 48 (2002).

3. FEDERAL COURT REVIEW

Gray's state post-conviction counsel filed a petition for writ of habeas corpus ("PWHC") in the United States District Court for the Eastern District of North Carolina ("district court") on May 20, 2002.

On March 28, 2006, the district court denied Gray's PWHC and amendment thereto. Applying the standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the deferential standard of 28 U.S.C. § 2254(d), the district court found that the state court's determination that trial counsel did not render ineffective assistance of counsel at sentencing was not contrary to or an unreasonable application of firmly established precedent of this Court. *See Williams v. Taylor*, 529 U.S. 362 (2000). The district court granted a certificate of appealability on three claims.

Gray's case was argued before the Fourth Circuit Court of Appeals on September 26, 2007. On June 24, 2008, the Fourth Circuit, in a 2-1 panel decision, affirmed in part and reversed in part, finding that Gray's trial counsel had rendered ineffective assistance of counsel at the sentencing phase of his trial. *Gray v. Branker*, 529 F.3d 220 (4th Cir. 2008).

The majority in the Fourth Circuit relied heavily upon this Court's decisions in *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005), and on the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. The majority found it compelling that Gray was noticed to be "agitated" during the course of a bitter and contentious divorce process and again after he was arrested and incarcerated for the murder of his wife. Trial counsel obtained an initial evaluation by a forensic psychiatrist (Dr. Lara) working at Dorothea Dix Hospital, a state mental health hospital. This psychiatrist found no significant impairment but concluded with an open-ended offer to revisit the diagnosis if further information became available. The majority characterized this as an "offer" of free mental health assistance and determined that trial counsel were deficient in their performance for not pursuing a potential avenue of a mental health defense. The majority dismissed the testimony from both of Gray's trial counsel that they did not find it unusual or out of the ordinary for Gray to seem depressed or initially suicidal considering that Gray was incarcerated and facing trial for the murder of his wife. The majority also ignored the results of the forensic psychiatrist's mental health evaluation, conducted on Gray within weeks of Roslyn Gray's murder, in which the psychiatrist found no evident psychosis or impairment of Gray's ability to understand his situation and further found that at the time of the murder Gray's ability to understand the quality of his actions and that his actions were wrong was not impaired.

Gray refused to authorize any funding to pursue a mental health inquiry. The majority faulted trial counsel for not pursuing an avenue that Gray refused to fund or otherwise cooperate in. To support this conclusion, the majority concluded that the state court's finding that Gray was not indigent was an erroneous factual finding. Gray had purportedly placed all of his resources in trust for the benefit of his children. However, Gray was represented by two retained counsel throughout the proceedings, Gray provided the funds to hire two experts including one for jury selection, and Gray never sought or was given indigent status by the state court.

The dissent in the Fourth Circuit disputed the basis upon which the majority found fault with the state court determinations. The dissent asserted that the majority inflated the importance of affidavits submitted by two doctors who had never evaluated Gray, who had placed significance on a psychiatric evaluation performed six years after the murder, and who had largely ignored the trial testimony of at least seven witnesses who offered first-hand observations and experience with Gray in the days and months before the murder. *Gray*, 529 F.3d at 243. Where the majority found compelling evidence to justify pursuing a mental health defense based upon affidavits from Dr. Barker (the murder victim's gynecologist) and Dr. Huber (the Gray family's marital therapist), the dissent pointed out that at trial Dr. Barker testified that Gray was in control and not delusional or psychotic and that Dr. Huber recommended counseling for Roslyn Gray and her children partly to counteract the pressure and manipulation from Gray. *Id.* at

243-45 (Duncan, J., dissenting in part). Neither Dr. Barker nor Dr. Huber was educated or trained in the area of recognizing and diagnosing mental illness.

In the evaluation that trial counsel did obtain, an evaluation performed within weeks of the murder, Dr. Patricio Lara, a forensic psychiatrist at Dorothea Dix Hospital, found no evident psychosis or impairment in Gray's ability to understand his situation. Dr. Lara did note stress related to Gray's circumstances and condition. Dr. Lara also noted that Gray's emotional response to his situation improved significantly. Unlike Dr. Bellard's six-year post-murder examination, Dr. Lara examined Gray near the time of the murder. The dissent concluded that the majority failed to afford trial counsel the high degree of deference due under *Strickland v. Washington*, 466 U.S. 668 (1984). The dissent found that the majority's reasoning and analysis effectively announced a *per se* rule requiring mental health investigation and evidence in every death penalty case. *Gray*, 529 F.3d at 250. Furthermore, the dissent faulted the majority for refusing to afford the state court's fact-finding the presumption of correctness to which it is entitled and for wholly disregarding the framework of AEDPA review. *Id.* at 248.

The Fourth Circuit denied the State's petition for rehearing and for rehearing *en banc* on July 28, 2008.

B. Factual Background

The North Carolina Supreme Court summarized the evidence presented at Gray's trial as follows:

> The evidence showed that Gray and the victim, his wife, were separated and engaged in a bitter divorce action involving child custody and equitable distribution. There was evidence of numerous assaults on the victim by the defendant prior to their separation and afterwards. The defendant had allegedly sexually assaulted the victim, choked her to the point of near unconsciousness, and stalked her.
>
> On 24 November 1992, the victim went to the defendant's house to leave their children after they had visited with her. The defendant went outside and got into the victim's Jeep. An eyewitness, who had been jogging on the street in front of the defendant's house, testified that he observed a Jeep in the street. He heard screaming and yelling coming from the Jeep. He saw a woman break from the Jeep and run up the driveway. The man, whom the witness identified as the defendant, also ran from the vehicle. The defendant then tackled the woman and straddled her. The

two people were on the ground struggling, with the defendant on top of the victim. The witness stopped and asked what was going on, and the defendant told him to leave. The victim said, "Mister, please don't leave. If you leave, he'll kill me." The jogger then heard a shot, and the defendant ran behind the house.

The victim was shot in the head. She died from this wound. The victim also suffered injuries from a stun-gun and a beating apparently with the butt of a pistol. The defendant contended that the victim was in possession of the stun-gun and that she had attempted to use it on him. The defendant stated that he threw the stun-gun in the bushes. It was subsequently found in the bushes beside the driveway.

The defendant first told police that he knew nothing about the incident and that he was in the bathtub at the time. He later stated that he and the victim were arguing and that the victim began to use a stun-gun on him. They struggled in the driveway, but he was only trying to subdue her so that they could talk about their divorce. After he took the stun-gun from her, he heard a click and looked to see the

> victim holding a gun. The gun was not yet pointed at the defendant. He pushed the gun away, and it went off.

State v. Gray, 347 N.C. at 161-62, 491 S.E.2d at 543-44.

WHY THE WRIT SHOULD ISSUE

I. The Fourth Circuit's expansive interpretation of this Court's opinions in *Wiggins v. Smith*, *Rompilla v. Beard*, and *Williams v. Taylor* denies the North Carolina state courts the deference their decisions are due under 28 U.S.C. § 2254(d) and (e) and supplants the deference due counsel's decisions under *Strickland* with an ABA Guidelines no-stone-unturned standard for investigations in every capital case.

The factual findings of state courts are entitled to a strong presumption of correctness under 28 U.S.C. § 2254(e)(1). This Court has stated that a federal court has no license to redetermine the credibility of a witness whose demeanor has been observed by a state court. *Marshall v. Lonberger*, 459 U.S. 422, 434-35 (1983). Nonetheless, *Wiggins*, *Rompilla*, and *Williams* are increasingly being relied upon as the vehicle to justify the second-guessing of the actions of trial counsel and the findings of state courts, all through the benefit of hindsight.

In the case *sub judice*, the majority rejected the state court's determination that Gray was not indigent. The majority rejected trial counsel's opinion that combining mental health defenses with the defense of accident might seem inconsistent to a jury. The majority likewise rejected the state court's findings that the opinions of Gray's post-conviction mental health expert were not credible. *Gray*, 529 F.3d at 231-32. Factual determinations such as these are entitled to deference under 28 U.S.C. § 2254(d) and (e). The majority substituted its own judgment and assessment of proper trial strategy and interpretation of facts for that of Gray's trial counsel and the state court. By doing so, the majority engaged in just the sort of second-guessing with the benefit of hindsight that this Court rejected in *Strickland v. Washington*, 466 U.S. 668. The majority's conclusion that Gray's trial counsel at sentencing were ineffective is admittedly largely fact-based. The nature of a claim of ineffective assistance of counsel requires the examining of how a federal reviewing court treats the factual findings of the state courts. It is the warping of *Strickland*'s deference to counsel and the state court's factual findings under 28 U.S.C. § 2254(d) and (e), under the guise of *Rompilla*, *Wiggins*, and *Williams*, that warrants this Court's exercise of certiorari review to rectify and clarify the impact of *Rompilla*, *Wiggins*, and *Williams* on *Strickland*.

This Court's opinions in *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); and *Williams v. Taylor*, 529 U.S. 362 (2000), have increasingly become the justification for federal courts to circumvent the required deference accorded

trial counsel by *Strickland v. Washington*, 466 U.S. 668, and to reject the presumption of correctness to which factual determinations of state courts are entitled under 28 U.S.C. § 2254(d). These cases have become the vehicles for substituting American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guidelines") for *Strickland* and section 2254(d) deference. In *Van Hook v. Anderson*, 535 F.3d 458 (6th Cir. 2008), and *Haliym v. Mitchell*, 492 F.3d 680 (6th Cir. 2007), the Sixth Circuit cited *Rompilla* and *Wiggins* as authority for the ABA Guidelines being the standard for the performance of counsel and requiring a complete no-stone-unturned mitigation investigation. *See also Wilson v. Sirmons*, 536 F.3d 1064 (10th Cir. 2008); *Frierson v. Woodford*, 463 F.3d 982 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 2976 (2007).

The ABA Guidelines require counsel to "discover all reasonably available mitigating evidence." For all intents and purposes, this is a no-stone-unturned standard that is in conflict with *Strickland* itself. *Strickland*, 466 U.S. at 691. The ABA Guidelines are not the constitutional minimums that counsel must follow: "In any event, the fact that the ABA may have chosen to recognize a given practice as desirable or appropriate does not mean that that practice is required by the Constitution." *Jones v. Barnes*, 463 U.S. 745, 753 n.6 (1983).

In *Strickland*, this Court rejected the contention that the Sixth Amendment requires a no-stone-unturned investigation in every capital case. "[W]hen a defendant has given counsel reason to believe that

pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Strickland*, 466 U.S. at 691. Notwithstanding *Strickland*, courts are increasingly using *Rompilla* and *Wiggins* to avoid *Strickland*'s holding. In *Thomas v. Beard*, 388 F. Supp. 2d 489, 506 (E.D. Pa. 2005), the district court found a duty to investigate mental health evidence even where the defendant refused to contribute in his defense and actively obstructed counsel's efforts. In *Richey v. Bradshaw*, 498 F.3d 344 (6th Cir. 2007), the Sixth Circuit used *Rompilla* to justify a finding of ineffective assistance where counsel did not seek a second expert opinion when the first expert's findings were not beneficial to the defendant. Dissenting opinions in *Frogge v. Branker*, No. 07-19, 2008 U.S. App. LEXIS 15132 (4th Cir. July 15, 2008) (unpublished); *McNeill v. Polk*, 476 F.3d 206 (4th Cir.), *cert. denied*, 128 S. Ct. 647 (2007); and *Buckner v. Polk*, 453 F.3d 195 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 1817 (2007), make clear the view that *Rompilla* mandates a no-stone-unturned sentencing investigation despite, for example, any prohibitions; lack of authorization or cooperation; or as in Gray's case, a refusal by a non-indigent defendant to provide the funds for such investigations. The use of *Rompilla* and *Wiggins* to effect a metamorphosis of the long-established *Strickland* standard is gaining traction. Therefore, the majority's warping and diminishing of *Strickland's* deference to counsel and the presumption of correctness due state court factual findings under 28 U.S.C. § 2254(e)(1) warrant this Court's exercise of certiorari review.

II. The state court's findings that an expert was not credible because of an insufficient factual basis and that trial counsel's assessment that mental health defenses and a defense of accident might seem inconsistent to a jury are the types of reasonable decisions that are entitled to deference under *Strickland* and 28 U.S.C. § 2254(d) and (e).

It is axiomatic that the actions, decisions, and conduct of trial counsel are judged from the perspective of the time of trial and not with the 20/20 perfect vision of hindsight. Similarly, trial counsel's decisions are to be accorded a high degree of deference. *See generally Strickland v. Washington*, 466 U.S. 668. The majority fails to evaluate trial counsel's actions in light of the information, knowledge, and observations available to trial counsel at the time of trial.

Gray was not poor, retarded, of borderline intelligence, abused, deprived, or living on the margins of society. Gray's intellect, status, and abilities were the exact opposite of these deficiencies. Gray was an intelligent, highly educated medical professional; he was wealthy; and he was the product of a comfortable and caring background and upbringing. This is the information possessed by trial counsel, and it is against this base of knowledge that trial counsel's actions are evaluated. Trial counsel's ***knowledge at the time*** is the pertinent point of reference under *Strickland*. The majority ignored the specifics of Gray's educational, social, and economic background that defined Gray as the client with whom trial

counsel were working. Worthington testified that he allowed police to question Gray and that he would never have done so if any issue existed as to Gray's mental abilities to withstand such questioning. (Pet. App. 155a.) On the evening of the murder, Worthington observed Gray take steps to thwart any gunshot-residue testing. Gray never exhibited any indications of instability or inability to cooperate and contribute to his defense. Gray denied any involvement in Roslyn Gray's death and then gradually adopted an "accident" version of the murder.

The client Gray presented to trial counsel stood in stark contrast to the defendants in the cases that the majority used as an analytical framework. In *Rompilla*, counsel was aware of the existence of prior criminal records and history as well as a documented history of mental health problems. Rompilla's counsel failed to review records that existed. Similarly, the defendant in *Wiggins* had a long and extensively documented history of mental health issues and difficult family background. Wiggins' counsel also failed to utilize information that existed and of which they were aware. Gray's trial counsel were not presented with such circumstances, nor did they fail to review and present information that existed and was readily available.

Gray was not a cooperative client and continually changed his story up to the eve of trial. Gray had no prior history of mental health issues. Gray's trial counsel did seek a mental health evaluation of Gray shortly after his arrest. In his report of December 29, 1992, which trial counsel were provided, Dr. Lara

made a diagnosis of adjustment disorder but noted that "[t]hese personality traits are presently observed under a situation of extreme stress and available findings cannot lead to a definite conclusion regarding the intensity of this patient's personality features nor to support full criteria for a diagnosis of a personality disorder." Dr. Lara noted that Gray's present situation might exaggerate observed traits and found no evident psychosis or impairment of Gray's ability to understand his situation and surroundings. Furthermore, Dr. Lara noted that Gray's condition did not impair his ability to understand the nature of his actions or to recognize right from wrong. These are hardly the "red flags" of mental illness that compelled further investigation by trial counsel. Worthington did not find it out of the ordinary for Gray to be depressed, despondent, or even suicidal after being arrested and incarcerated for murdering his wife. Such symptoms and behavior are hardly noteworthy or surprising, especially for a person of Gray's status. Gray's trial counsel's opinions to that effect were reasonable. It could be argued that the failure to exhibit such symptoms would more likely provide cause to suspect mental issues. In fact, in his 1993 report, Dr. Lara noted that Gray's emotional responses improved significantly over the course of a few weeks, lending further credence and support to Worthington's observations.

In justification of its second-guessing of trial counsel, the majority placed emphasis on the testimony of a mental health professional Dr. James Bellard, who was employed for the purpose of state post-conviction review. In doing so, the majority

rejected the state court's findings that discounted Dr. Bellard's testimony. The majority failed to abide by *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Rushen v. Spain*, 464 U.S. 114 (1983); and 28 U.S.C. § 2254(e)(1) in not according a state court's factual determinations the presumption of correctness to which they are entitled. The majority's reasoning in concluding that the state court's discounting of Dr. Bellard's testimony was objectively unreasonable is symptomatic of the after-the-fact second-guessing that permeates the opinion and is contrary to this Court's *Strickland* standard. The dissent in the Fourth Circuit grasped the extensive second-guessing in which the majority engaged:

> The majority suggests that the MAR court's reasons for discounting Dr. Bellard's testimony were "objectively unreasonable." Majority Op. at 22. The first factor in the MAR court's decision was the fact that Dr. Bellard's opinion, based on a total of four hours spent with Gray, took place six years after the murder. I fail to see how the brevity of the evaluation and the significant time gap between the murder and the evaluation were "objectively unreasonable" factors for the MAR court to have considered. The MAR court also found it significant that "Dr. Bellard had not reviewed the trial testimony which set forth defendant's actions and conduct in the days and

> months leading up to the murder . . . as well as the friends relatives, and associates of defendant." J.A. 1562. Instead of recognizing the reasonableness of discounting Dr. Bellard's testimony on this basis, the majority instead highlights the sliver of the trial record that Dr. Bellard did review: the testimony of one witness, Gray's son's counselor; the testimony of Gray himself; and two affidavits. That Dr. Bellard performed this limited review does nothing to lessen the import of the evidence Dr. Bellard failed to review and the reasonableness of the MAR court's recognition of the resulting limits of Dr. Bellard's testimony.

Gray, 529 F.3d at 247-48 (Duncan, J., dissenting in part).

The state post-conviction court found Dr. Bellard's testimony to be less than compelling because, among other reasons, his evaluation was performed six years after the murder. The state court reasonably chose to give credence to a mental health evaluation performed within weeks of the murder instead of one performed six years after the murder. Other circuits have likewise recognized the shortcomings in after-the-fact expert testimony such as Dr. Bellard's. *See, e.g.*, *Davis v. Singletary*, 119 F.3d 1471, 1475 (11th Cir. 1997) (noting that it is not surprising that defendants can find experts to testify favorably years after the fact),

cert. denied, 523 U.S. 1141 (1998). The state post-conviction court found extensive shortcomings in Dr. Bellard's work and testimony, which included: failure to perform any psychological testing; failure to read any of the available transcript of the trial describing Gray and his actions before, during, and after the murder other than Gray's own testimony and that of a family therapist; failure to do any affirmative testing to eliminate malingering; and failure to read any of the transcript describing Gray's planning, his stalking and terrorizing of Mrs. Gray, and his use of their children in an attempt to avoid implication in the murder. Dr. Bellard was largely ignorant of any of the facts surrounding the murder of Roslyn Gray. (Pet. App. 153a-54a.) The majority ignored these reasonable concerns of the state court. In doing so, the majority failed to accord a presumption of correctness to state court findings that are required under *Miller-El v. Cockrell*, *Rushen v. Spain*, and 28 U.S.C. § 2254(e)(1). The majority substituted its own judgment for that of trial counsel based upon the benefit of hindsight.

It is not for the majority to substitute its credibility assessments for that of the state court. *Marshall v. Lonberger*, 459 U.S. 422, 434-35 (1983). It is the state court's province to make evaluations of live testimony and expert testimony, and the majority owes deference to the state court's findings. *See Maggio v. Fulford*, 462 U.S. 111 (1983).

Further, the majority rejected out of hand the concern expressed by trial counsel in state court testimony that a mental illness strategy as an

explanation in sentencing would have been inconsistent with the defense of an accident utilized at guilt/innocence. The majority posits that mental health defenses and "accident" could be combined in a plausible defense. *Gray*, 529 F.3d at 231. Even if true, it does not warrant the majority's substituting its judgment of what the appropriate trial strategy should have been. This Court in *Strickland* forbade such hindsight substitutions. The *Gray* majority failed to accord the state court's findings of fact the deferential standard of review required under 28 U.S.C. § 2254(d) and *Williams v. Taylor*, 529 U.S. at 410-11.

III. A defendant who retains and pays for services of trial counsel and who ignores the advice of retained counsel and refuses to pay for mental health expert assistance cannot then allege ineffectiveness of his retained counsel in failing to retain and employ the mental health expert.

Gray's trial counsel were retained. Gray specifically refused to authorize funds for mental health experts or inquiry into his mental health and effectively rejected trial counsel's suggestion for contingency defense efforts in this area. The majority avoids the problem of retained counsel and Gray's refusal to fund, participate, or allow inquiry into any potential mental health areas by determining that though Gray may not have initially been indigent, he subsequently placed his assets in a trust for the benefit of his children and made himself indigent. Based upon the foregoing, the majority deemed the state post-conviction court's factual finding that Gray

was not indigent to be erroneous. Here again, the majority engages in second-guessing, selective interpretation of the facts, and substituting its judgment and interpretation of the facts for that of trial counsel and the state courts.

Gray never claimed indigency during state court proceedings. Gray retained trial counsel Worthington at the time of the murder in the fall of 1992. In the spring of 1993, Gray retained a second counsel, Dal Wooten. While Gray placed his money "in trust for the benefit of his children," he continued to have access to his financial resources. Gray continued to have the necessary funds to hire and employ an expert for a change of venue motion in September of 1993, one month before trial. In addition, Gray authorized funds for a surveyor to look for a weapon. Trial counsel Worthington testified that Gray was to authorize any expenses and that Gray specifically refused to authorize any monies for mental health evaluations or evidence. The majority's conclusion that Gray was indigent, that he had no access to his own money, and that the state post-conviction court's finding to the contrary is not supported by the factual record is itself an erroneous factual conclusion derived in hindsight from selective factual interpretation. The majority faulted Gray's trial counsel for not continually pushing Gray for authority to fund a mental health inquiry. In doing this, the majority continued to ignore that Dr. Lara, in his report, gave no indication this would be a fruitful area to pursue; that neither of Gray's trial counsel observed any indication of mental health issues; and that there was no past history of any mental health issues. The majority relied extensively

upon *Rompilla* and *Wiggins*, yet brushed aside this Court's holding in *Schriro v. Landrigan*, 127 S. Ct. 1933, 1942 (2007), in which this Court itself noted that "[n]either *Wiggins* nor *Strickland* addresses a situation in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court." As Gray was not indigent, never alleged he was indigent, never sought to be declared indigent, and prohibited counsel from obtaining a mental health expert or making further inquiry into Gray's mental health, the majority conflicts with this Court's holding in *Schriro v. Landrigan* and fails to accord the state court's findings the presumption of correctness to which they are entitled under the deferential standard of review of 28 U.S.C. § 2254(d) and (e)(1) and *Williams v. Taylor*, 529 U.S. at 410-11.

CONCLUSION

For the reasons discussed above, Petitioner Branker respectfully prays and requests that a writ of certiorari issue to review the decision of the Fourth Circuit that reversed the decision of the district court, in part, and granted the writ of habeas corpus to Gray on his claim of ineffective assistance of counsel at sentencing.

Respectfully submitted,

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APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

WILLIAM ROBERT GRAY, JR., *Petitioner-Appellant,* v. GERALD J. BRANKER, Warden, Central Prison, Raleigh, North Carolina, *Respondent-Appellee.*	No. 06-29

Appeal from the United States District Court
for the Eastern District of North Carolina,
at Raleigh.
Terrence W. Boyle, District Judge.
(5:02-hc-00335-BO)

Argued: September 26, 2007

Decided: June 24, 2008

Before MICHAEL, GREGORY, and DUNCAN,
Circuit Judges.

Affirmed in part, reversed in part, and remanded by published opinion. Judge Michael wrote the opinion,

in which Judge Gregory joined. Judge Duncan wrote a separate opinion concurring in part and dissenting in part.

COUNSEL

ARGUED: Milton Gordon Widenhouse, Jr., RUDOLF, WIDENHOUSE & FIALKO, Chapel Hill, North Carolina, for Appellant. Steven Mark Arbogast, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Paul M. Green, Durham, North Carolina, for Appellant. Roy Cooper, Attorney General of North Carolina, Raleigh, North Carolina, for Appellee.

OPINION

MICHAEL, Circuit Judge:

William Robert Gray, Jr., was convicted of first degree murder and sentenced to death in North Carolina state court for the 1992 murder of his estranged wife. After the North Carolina courts rejected his direct appeal and denied post-conviction relief, Gray filed a petition for a writ of habeas corpus in U.S. district court, asserting several ineffective assistance of counsel claims. The district court denied all claims. We reverse in part, concluding that Gray is entitled to a new sentencing proceeding. This result is required because the North Carolina post-conviction court's denial of Gray's claim of ineffective assistance of counsel in the sentencing phase was contrary to, and an unreasonable application of, the standards set out

in *Strickland v. Washington*, 466 U.S. 668 (1984). *See* 28 U.S.C. § 2254(d). Counsel rendered ineffective assistance by failing to investigate and develop, for sentencing purposes, evidence that Gray suffered from a severe mental illness, and it is reasonably probable that this failure prejudiced the outcome at sentencing. We conclude that the district court properly rejected Gray's claim that he was denied effective assistance of counsel because his lead lawyer was a potential defense witness and therefore labored under a conflict of interest. Finally, we conclude that the district court correctly held that two claims Gray asserted in an amendment to his federal habeas petition were barred by the statute of limitations.

I.

Gray was a dentist in Kinston, North Carolina. In mid-February 1992 his wife of twenty-two years, Roslyn Gray, told him that she intended to move out of their home and seek a divorce. The two separated in April of that year, and a contentious divorce proceeding ensued with bitter disputes over child custody and property distribution. Gray, who remained in the home after the separation, was granted temporary custody of the couple's two children, an eleven-year-old son and an eight-year-old daughter.

In the months after Mrs. Gray announced her intentions and sued for divorce, Gray became increasingly distraught, emotional, and disturbed, according to his friends and associates. Gray "didn't have a grasp of what was going on," J.A. 822, and

"didn't appear to be in his right mind," J.A. 802. For instance, Gray made "very agitated" telephone calls and visits to the office of Mrs. Gray's gynecologist, Dr. Marshall Jay Barker, who also had training in psychology. J.A. 782. In Dr. Barker's "medical opinion" Gray suffered from a "behavioral aberration and psychological problem" that included obsessive compulsion. J.A. 784, 224. The Grays briefly sought marital counseling, but the counselor withdrew because of her alarm about Gray's challenging and confrontational conduct. Mrs. Gray's lawyer sought a court order for a mental assessment of Gray, relying on affidavits from Dr. Barker and the marital counselor. Gray's divorce lawyer withdrew from the case, citing "irreconcilable differences" with Gray and difficulty communicating with him. J.A. 232. Gray retained his second divorce lawyer, Bob Worthington, on November 13, 1992.

Mrs. Gray had visitation privileges with the children at times specified by court order. The events that led to Gray's conviction for the murder of Mrs. Gray occurred at the end of the last visitation and are described as follows by the North Carolina Supreme Court:

> On [the evening of] 24 November 1992, [Mrs. Gray] went to [Gray's] house to leave their children after they had visited with her. [Gray] went outside and got into [Mrs. Gray's] Jeep. An eyewitness, who had been jogging on the street in front of [Gray's] house, testified that he observed a Jeep in the street. He heard screaming and yelling coming from the

> Jeep. He saw a woman break from the Jeep and run up the driveway. The man, whom the witness identified as [Gray], also ran from the vehicle. [Gray] then tackled the woman and straddled her. The two people were on the ground struggling, with [Gray] on top of [Mrs. Gray]. The witness stopped and asked what was going on, and [Gray] told him to leave. [Mrs. Gray] said, "Mister, please don't leave. If you leave, he'll kill me." The jogger then heard a shot, and [Gray] ran behind the house.
>
> [Mrs. Gray] was shot in the head. She died from this wound. [She] also suffered injuries from a stun-gun and a beating apparently with the butt of a pistol.

State v. Gray, 491 S.E.2d 538, 543-44 (N.C. 1997) (opinion on direct review).

The police arrested Gray later that night. At Gray's request, Worthington, his divorce lawyer hired eleven days earlier, was called to the police station. After Worthington arrived, he and Gray talked privately in an interview room, and Gray said he had been in the bathtub at the time of the shooting. Worthington and Gray were interrupted by a detective who asked whether Gray would submit to hand wipings for a gunshot residue test (a paraffin test). The detective left, and Worthington recommended that Gray submit to the test; Gray agreed and then asked for some water. Worthington went to the door and passed Gray's request to an officer, who brought Gray

a soda can full of water. Gray, alone again with Worthington, used the water to wash his hands as Worthington watched. Worthington's instant reaction was, "Oh, shit," but he nevertheless allowed Gray to submit to the paraffin test. J.A. 1700. Shortly thereafter, at Worthington's urging, Gray gave a statement to the police, asserting his bathtub alibi.

In the following week Gray formally hired Worthington to represent him on the charge of first-degree murder. Worthington had never handled a capital case and had been involved in only one first-degree murder case. About fifty percent of his practice involved criminal cases.

Signs of Gray's unstable mental and emotional condition persisted after he was incarcerated in the Lenoir County Jail. He was placed on suicide watch, and the jail matron checked on him every fifteen minutes, noting in her log that he was "VERY depressed." J.A. 889-90. Gray told the matron that he had not slept for the previous two months. During his first week in jail, Gray, who seemed unable to focus, fainted during a visit by a friend. At the urging of the chief jailer, Worthington filed a motion on November 30, 1993, asking the court to commit Gray for an evaluation of his capacity to proceed in the case. Worthington noted in the motion that Gray "appears in [a] state of shock and unable to appreciate the gravity of the situation." J.A. 240. The motion was granted immediately, and the next day, December 1, 1993, Gray was transferred to Dorothea Dix Hospital, a state psychiatric facility. As Gray was about to be moved, Worthington advised him to "be careful about

what he said" at Dorothea Dix, and Gray responded that he understood. J.A. 1659.

At Dorothea Dix a forensic psychiatrist, Patricio Lara, M.D., evaluated Gray with respect to his capacity to proceed on the pending charge of murder. Dr. Lara based his evaluation on interviews with Gray, observations of his behavior, psychological testing, and a physical examination. Dr. Lara also had certain information from Worthington, the arresting officer, the jail, and Gray's friend, Donald Hollowell. As Dr. Lara emphasized, the information he was provided about Gray's "condition prior to the incident in question [was] quite limited." J.A. 46. Indeed, Worthington did not even give Dr. Lara the affidavits, contained in Gray's divorce file, of Dr. Barker (noting Gray's behavioral aberration and psychological problem) and the marital counselor (noting alarm about Gray's confrontational conduct). Dr. Lara's report described Gray as uncooperative and guarded. Nonetheless, Dr. Lara noted that Gray had been under ongoing stress prior to the shooting and that the "magnitude" of the stress "may have contributed to regression in behavior and reductions in impulse control." J.A. 45. While Dr. Lara found Gray competent to stand trial, he diagnosed Gray with "adjustment disorder with mixed disturbance of emotions and conduct," DSM (Diagnostic and Statistical Manual of Mental Disorders) category 309.40. J.A. 45. There was also evidence of "narcissistic traits with some features of paranoid nature." J.A. 44. Dr. Lara strongly suggested psychiatric counseling for Gray, stating that medication might become necessary. At the end of his

report, Dr. Lara offered further assistance in Gray's case. If Dr. Lara could be provided additional information about "[Gray's] functioning and condition prior to [the incident in question]," he would endeavor to "expand [his] opinions" about Gray's condition at the time of the incident. J.A. 46.

Gray was returned to the Lenoir County Jail on January 6, 1993, after spending five weeks at Dorothea Dix. Copies of Dr. Lara's report were provided to Worthington, Gray, and the court. Worthington took particular note of Dr. Lara's statement that the magnitude of stress in Gray's life prior to the shooting may have contributed to regressive behavior and loss of impulse control. As a result, Worthington promptly suggested to Gray that they hire an independent psychiatrist for further evaluation. Gray refused, telling Worthington "not to spend another fing penny on this trial, that he didn't need a psychiatrist," and that "[t]here was nothing wrong with him." J.A. 1666. After this one conversation, which occurred prior to Gray's indictment, Worthington never again talked with Gray about investigating mental health evidence. Gray's friends continued to describe him as irrational and "damaged emotionally." J.A. 884. Gray was suffering from anxiety attacks, and on January 22, 1993, he had another fainting spell. He was temporarily transferred to a state prison, and when he was returned to the county jail on January 27, he was assigned to the juvenile cellblock, where Worthington requested that he be kept "[d]ue to his physical and mental condition." J.A. 263.

On April 6, 1993, at Worthington's suggestion, Gray retained a second lawyer, Dal Wooten, to assist in his defense. Like Worthington, Wooten had never represented a client in a capital case. Wooten read Dr. Lara's report, but he saw nothing in it to indicate that mental health evidence should be considered. Indeed, he and Worthington never discussed with each other the possibility of presenting mental health evidence. On May 10, 1993, Gray was indicted on a charge of first degree murder. That week, Gray placed all of his assets in an irrevocable trust for his children.

On October 12, 1993, about two weeks before Gray's trial began, Worthington was shot and wounded in the shoulder by his wife during a domestic dispute. The police charged Mrs. Worthington with assault with a deadly weapon with intent to kill, inflicting serious injury. Worthington was treated at a local hospital, and his shooting and Gray's case were linked in media coverage. Worthington told Gray that his (Worthington's) shooting was an accident, and Gray consented to Worthington's continuing representation.

Defense counsel relied on Gray's dubious alibi for eleven months. Then, nine days before trial, on October 22, 1993, Gray admitted to his lawyers that Mrs. Gray was shot during the altercation in the driveway. Gray's trial began on November 1, 1993. In the guilt phase the state presented evidence about Gray's false alibi and evidence that he had physically and psychologically abused Mrs. Gray both before and after the separation. There was eyewitness testimony about the driveway altercation that ended with Mrs. Gray's death. The state's forensic pathologist

testified that Mrs. Gray died from a bullet wound to the head, that a pair of marks on her face could have come from contact with a stun gun, and that a blunt force injury to her face was consistent with a blow from the butt end of a handgun. Gray testified in his own defense. He said that Mrs. Gray pointed a pistol at him and, when he pushed it away, it discharged, striking her in the head. Gray said he lied to the police about being in the bathtub because he did not think anyone would believe the truth. The defense presented no mental health evidence. The jury convicted Gray of first degree murder.

When the case reached the sentencing phase on December 14, 1993, the presentation of evidence took less than a day. The state offered one witness in its direct case: a court clerk testified that, at the time of Mrs. Gray's death, Gray was subject to four outstanding misdemeanor warrants — obtained by Mrs. Gray on June 26, 1992 — for attempted assault with a deadly weapon, communicating threats, assault on a female, and false imprisonment. A recreation director testified in rebuttal that Gray was once removed as a Little League coach because he yelled at the players. The defense presented six character witnesses. Gray's son testified that he was a good, dedicated, and involved father. Another witness testified on direct that Gray was a committed and supportive husband and on cross that Gray was distraught by his separation from Mrs. Gray and his efforts to manage a household. Others testified that Gray was a good son to his ailing mother and a committed Little League coach. Again, Gray's counsel

introduced no mental health evidence through either lay or expert testimony.

The jury recommended a death sentence on the basis of three aggravating factors: (1) the murder was especially heinous, atrocious, or cruel; (2) it was committed to disrupt or hinder a governmental function (a court order compelling discovery in the divorce case); and (3) it was committed because of Mrs. Gray's exercise of her official duty as a witness (swearing out warrants against Gray and being a potential witness with respect to the charges). *See* N.C. Gen. Stat. § 15A-2000(e)(7), (e)(8), and (e)(9). The jury unanimously rejected two mitigating factors relating to mental health: that the offense was committed while Gray was under the influence of mental or emotional disturbance and that Gray's capacity to conform his conduct to the requirements of law was impaired. *See id.* § 15A-2000(f)(2) & (f)(6). Gray was sentenced to death.

After sentencing the trial court found Gray to be indigent and appointed new lawyers for his appeal. The Supreme Court of North Carolina affirmed Gray's conviction and sentence, *State v. Gray*, 491 S.E.2d 538 (1997), and the U.S. Supreme Court denied certiorari, *Gray v. North Carolina*, 523 U.S. 1031 (1998). Gray filed a motion for appropriate relief (MAR) in the North Carolina trial court, alleging various claims of ineffective assistance of trial counsel, conflict of interest on the part of trial counsel, and ineffective assistance of appellate counsel. In particular, Gray alleged that his trial counsel were ineffective in failing to engage an expert to assist in investigating,

developing, and presenting mental health evidence in mitigation at sentencing. At the MAR hearing Gray introduced the testimony and affidavit of psychiatrist James Bellard, M.D. Dr. Bellard, who interviewed Gray twice in January 1999 and reviewed excerpts of the trial record, testified that at the time of the offense Gray had a paranoid personality disorder with a severity of eight on a scale of one to ten. According to Dr. Bellard, Gray was in considerable emotional distress at the time, and his ability to function was impaired by his personality disorder and exacerbated by the stress of his marital discord. Dr. Bellard opined that, while Gray could conform his conduct to the requirements of law, his capacity to do so was significantly impaired. The MAR court denied relief on December 1, 2000, and the Supreme Court of North Carolina later denied certiorari.

Next, in May 2002 Gray filed a petition for a writ of habeas corpus in U.S. district court. Two years later Gray amended his petition to include additional claims. The district court granted the state's motion for summary judgment, rejecting Gray's initial claims on the merits and his amendments on statute of limitations grounds under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(d)(1). Gray appeals the district court's order, arguing that the writ should have been awarded on two bases: the ineffective assistance of trial counsel in failing to investigate and develop, for sentencing purposes, evidence of Gray's mental impairment, and lead counsel's failure to withdraw as a result of a conflict of interest (Worthington was a potential witness). Gray also argues that the writ should have

been granted on two claims (asserted by amendment) that the district court rejected as time barred: that Worthington labored under a conflict because of his wife's prosecution for domestic assault by the same authorities prosecuting Gray, and that trial counsel were ineffective in failing to present a forensic pathologist for the defense. Certificates of appealability were granted on these issues.

II.

Our review is *de novo* when a district court's decision on a petition for a writ of habeas corpus is based on the state court record. *Williams v. Ozmint*, 494 F.3d 478, 483 (4th Cir. 2007). According to AEDPA, a federal court should not grant habeas relief on any claim adjudicated on the merits in state court unless the adjudication resulted in a decision that (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). As the Supreme Court explained in *Williams v. Taylor*:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law . . . . Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the

> correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

529 U.S. 362, 412-13 (2000). State court factual determinations are presumed to be correct and may be rebutted only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

III.

Gray contends first that he was denied his Sixth Amendment right to counsel because his lawyers failed to investigate and develop (for sentencing) mitigating evidence about his impaired mental condition at the time of the offense. To prevail on an ineffective assistance claim, a petitioner must establish (1) that counsel's performance was deficient and (2) that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We conclude, as explained below, that the North Carolina MAR court engaged in an unreasonable application of Supreme Court precedent concerning both of *Strickland*'s components. Furthermore, in assessing prejudice, the MAR court held Gray to an inappropriately high standard of proof that was contrary to *Strickland*'s standard of a "reasonable probability" of a different result. *See id.* at 694; 28 U.S.C. § 2254(d). An objectively reasonable application of *Strickland* principles compels the conclusion that Gray's lawyers were prejudicially ineffective in their failure to investigate and develop,

for sentencing purposes, evidence of Gray's impaired mental condition.

A.

To establish deficient performance under *Strickland*, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The performance of counsel is measured in terms of "reasonableness under prevailing professional norms." *Id.* at 688. Our evaluation of performance "must be highly deferential," judged "on the facts of the particular case," and considered "from counsel's perspective at the time." *Id.* 689, 690. The performance inquiry in this case centers on the nature of counsel's duty to investigate mitigating evidence for sentencing in a capital case. *Strickland* does not require defense counsel to "investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins v. Smith*, 539 U.S. 510, 533 (2003) (citing *Strickland*, 466 U.S. at 689). Instead, it imposes upon counsel "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691; *see Wiggins*, 539 U.S. at 533.

"Prevailing norms of practice as reflected in the American Bar Association standards and the like are guides to determining what is reasonable, but they are only guides." *Stickland*, 466 U.S. at 688 (citation omitted); *see also Meyer v. Branker*, 506 F.3d 358, 372

(4th Cir. 2007) (noting that although the ABA Guidelines can be relevant "in determining what constitutes reasonable performance in a capital trial, they certainly cannot be dispositive in and of themselves" (citations omitted)). According to the Supreme Court, it was a "well-defined norm[ ]" at the time of Gray's trial that "investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence.'" *Wiggins*, 539 U.S. at 524 (quoting American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1.C (1989) (ABA Guidelines)). The ABA Guidelines suggested that one avenue of investigation that counsel should consider is the condition of the defendant's mental health. ABA Guidelines 11.8.3.F.2, 11.8.6.B. The Guidelines also advised that "[t]he assistance of one or more experts (e.g., social worker, psychologist, psychiatrist, investigator, etc.)" in the investigation, development, and presentation of relevant mitigating evidence "may be determinative as to [the] outcome" at sentencing. ABA Guideline 11.8.6 cmt.; *see also id.* 1.1 cmt., 5.1.1.A.v, 11.4.1. Counsel's "strategic choices made after thorough investigation . . . are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. In evaluating an ineffective assistance claim, a court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690.

The critical question here is whether Gray exhibited signs of mental and emotional instability that made it essential for his counsel to investigate for evidence of mental impairment. In concluding that Gray did not establish that his counsel performed in a deficient manner, the MAR court failed to consider the reasonableness of counsel's actual performance under prevailing professional norms, which include the duty to make considered decisions about areas of potential investigation, as *Strickland* requires. *See* 466 U.S. at 688, 690-91. The MAR court thus arrived at its determination through an unreasonable application of *Strickland*.

1.

Gray's counsel were confronted repeatedly with indications of Gray's mental impairment. Nevertheless, without making reasoned strategic decisions, counsel ignored these red flags and failed to investigate for mental health evidence or consider introducing evidence on that issue. *See Rompilla v. Beard*, 545 U.S. 374, 392 (2005). To begin with, the Gray divorce file, handed to Worthington just days before he assumed the representation of Gray in the murder case, contained two affidavits from professionals who warned explicitly about Gray's mental instability: Dr. Barker described Gray as suffering from behavior aberration and a psychological problem; a marriage counselor stated that she withdrew her services because she was alarmed by Gray's challenging and confrontational conduct. Likewise, the investigation that defense counsel did conduct led to statements by Gray's friends and

associates that prior to the offense he was "very disturbed," "very agitated," not "in his right mind," and "distraught" over the breakup of his marriage. J.A. 822, 782, 802, 1292. After the offense Gray's jailers placed him under suicide watch, observing that he was very depressed and having anxiety attacks and fainting spells; a friend who telephoned Gray while he was incarcerated said he was "not . . . one hundred percent rational." J.A. 884. Finally, Dr. Lara, a psychiatrist, diagnosed Gray with a psychiatric impairment, stating that he suffered from "regression in behavior and reductions in impulse control" at the time of the offense. J.A. 45. Dr. Lara recommended further evaluation of Gray's mental condition at the time of the offense and offered additional assistance in that regard.

Despite the many indications of Gray's mental impairment and the well-marked paths to the development of evidence about the impairment, Worthington had only one conversation with Gray about pursuing mental health evidence through an independent psychiatrist. Gray responded that he did not want to spend more money on the case and that he did not need a psychiatrist (Dr. Lara had also recommended that Gray undergo psychiatric counseling). This conversation occurred prior to indictment and long before Gray or his lawyers knew that he would be tried for a capital offense, yet Worthington never again raised the subject of mental health evidence with Gray. After Wooten, the second lawyer, came into the case, he looked at Dr. Lara's report, but failed to see any need to investigate for evidence of mental impairment. Gray's two lawyers

never once discussed with each other the advisability of exploring the need for mental health testimony from an expert.

Defense counsel should not have dispensed with a mental health investigation just because Gray did not want to hire an independent psychiatrist at the pre-indictment stage, well before the state announced its intention to seek the death penalty. *See* ABA Guideline 11.4.1.C ("The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered."). Defense counsel had an offer of mental health investigation assistance from Dr. Lara, and that assistance was available free of charge[1]. Dr. Lara said that if he was provided further information about Gray's behavior and functioning prior to the offense, he would endeavor to make a more definitive diagnosis of Gray's mental condition at the time of the offense. Defense counsel completely ignored Dr. Lara' s offer, despite the fact that the information specified and sought by Dr. Lara was at their fingertips. Nor did counsel seek court approval

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[1] Contrary to the dissent's assertion, *see post* at 37 n.5, the MAR record supports the statement that Dr. Lara would have supplemented his evaluation at no cost to Gray. As Dr. Lara's report reveals, he was employed as a forensic psychiatrist at the pretrial detention center at Dorothea Dix Hospital, a state psychiatric facility operated by the Secretary of the North Carolina Department of Health and Human Services. *See* N.C. Gen. Stat. Ann. § 122C-181. Moreover, even assuming that Dorothea Dix would have charged for the additional services volunteered by Dr. Lara, Gray's counsel could have moved for further evaluation at state expense once Gray became indigent.

to hire an independent psychiatrist at state expense when Gray became indigent shortly after his indictment. Finally, counsel failed to consider the issue of mental health evidence even after the jury returned a guilty verdict and Gray faced the certainty of a capital sentencing proceeding.

Counsel's failure to conduct an investigation into mental health evidence was not the result of "reasonable professional judgments." *Strickland*, 466 U.S. at 691; *Wiggins*, 539 U.S. at 534; *see also Meyer*, 506 F.3d at 372. There was simply no consideration of whether a defense based on psychiatric evidence might be a strategy worth exploring. It was the chief jailer, and not Worthington, who first suggested that Gray undergo a competency evaluation. Moreover, counsel pursued a questionable alibi theory until days before trial, completely ignoring an avenue of investigation (potential mental health evidence) that held promise, according to Dr. Lara's report. There is no indication that Worthington and Wooten, who had no experience whatsoever in capital litigation, understood that such evidence can be an important factor in a jury's decision at sentencing. In short, counsel's failure to investigate and develop evidence of Gray's mental impairment was not a carefully considered strategic choice.

The MAR court's conclusion that Gray failed to satisfy *Strickland*'s deficient performance component was based on several erroneous determinations. The court concluded that the accident defense adopted at the last minute by Gray's lawyers was inconsistent with a defense of diminished mental responsibility. This conclusion fails to consider that Gray's "counsel

were not in a position to make [an informed] strategic choice" about what defense theory or theories to pursue because they had failed to undertake a reasonable investigation *before* making that choice. *Wiggins*, 539 U.S. at 536. Moreover, common sense dictates that an accident defense and an impaired mental capacity defense would have been compatible in Gray's case. Pursuit of the two theories would have paved the way for the obvious argument that Gray's mental illness led to his altercation with Mrs. Gray in the driveway, which, in turn, led to her accidental shooting. The MAR court also discounted the testimony of Dr. Bellard and, in doing so, overlooked a basic lesson from that testimony: a reasonable investigation by counsel could have led to the development of mental health evidence, such as the expert opinion offered by Dr. Bellard, and that evidence would have been admissible in mitigation at sentencing.

Finally, the MAR court relied heavily on Gray's one-time refusal to hire an independent psychiatrist. This reliance was unreasonable for several reasons. First, as discussed above, Gray's statement came quite early in the proceedings, before he knew that he was facing the potential of a death sentence. Even when the stakes were raised to the level of life or death, counsel did not revisit the mental health evidence issue, either between themselves or with Gray. Second, a reasonable lawyer would not rely on his client's self-assessment of his mental health, especially in a capital case. There was an independent duty to investigate. Third, the MAR court found that *Strickland*'s first element was not satisfied specifically

because Gray was not indigent and had not authorized funds for an independent psychiatric examination. Gray has rebutted this finding by clear and convincing evidence that he was in fact indigent at the time of trial, having placed all of his assets in an irrevocable trust for his children six months earlier. As the Supreme Court has said, the state court's "partial reliance on an erroneous factual finding further highlights the unreasonableness of [its] decision." *Wiggins*, 539 U.S. at 528. Fourth, regardless of Gray's financial status, further psychiatric evaluation could have been obtained from Dr. Lara free of charge.

In arguing that Gray's refusal to spend his own funds for a psychiatric evaluation ended his counsel's responsibility to investigate for mental health evidence, the state urges us to extend the Supreme Court's recent ruling in *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007). *Schriro* holds that when a defendant "inform[ed] the [trial] court [during the sentencing hearing] that he did not want mitigating evidence presented," a reviewing court could reasonably conclude that counsel was not required to present such evidence against his client's clear directive. *Id.* at 1942. The Court was careful to distinguish the circumstances in *Schriro* from those in *Rompilla*, where the Court found ineffective assistance of counsel when "the defendant refused to assist in the development of a mitigation case, but did not inform the court that he did not want mitigating evidence presented." *Id.* (citing *Rompilla*, 545 U.S. at 381). In *Schriro* the Court thus reaffirmed the Court's earlier holdings that counsel has an affirmative duty to investigate for mitigating evidence when preparing for

sentencing. *See Rompilla*, 545 U.S. at 381; *Wiggins*, 539 U.S. at 523. Here, Gray, displaying an attitude of noncooperation similar to that of the petitioner in *Rompilla*, made a statement to one of his lawyers very early in the case indicating that he did not wish to spend his money on a psychiatrist. Nothing in *Schriro* permits Gray's statement to be used to relieve his counsel of their duty to investigate for mitigating mental health evidence.

As we have already emphasized, prior to their representation of Gray neither Worthington nor Wooten had ever represented a client facing the death penalty. There is no indication that either understood that expert mental health evidence could be critical to the jury's decision on sentencing. There is no indication that either understood his duty, in light of the circumstances in Gray's case, to make a thorough investigation into Gray's mental health and to consider introducing expert evidence on that subject. Gray's lawyers simply missed or ignored — and failed to act on — the many signs that Gray was mentally and emotionally unstable. Because their failure to investigate in this area was unreasonable under prevailing professional norms, Gray has established *Strickland*'s element of deficient performance.

2.

The dissent's attacks on our conclusion that Gray's counsel were ineffective in failing to investigate Gray's mental health can be boiled down to two, and both miss the mark.

First, the dissent claims that we take "liberties . . . with the facts," "spin" the facts, and "mischaracterize[] record evidence" in concluding that there were sufficient signs to alert Gray's counsel to the need for an investigation into Gray's mental health. *Post* at 31, 33 n.1, 31; *see also post* at 32 (speaking of the "contrived nature of the majority's [factual] support"). No spin or mischaracterization is necessary to establish that Gray's counsel had sufficient notice. The dissent begins its efforts to discount the signs of Gray's mental instability by launching an extended attack on the divorce proceeding affidavits of Dr. Barker (Mrs. Gray's gynecologist) and Marilyn Huber (the Grays' marital counselor). The dissent argues that these affidavits did not establish that Gray "suffer[ed] from a diagnosable mental illness" or that Gray's mental health was worthy of investigation, *post* at 50, 38, but that is not our point. The point is that the affidavits, which Worthington had at the outset, were the first of many indications of Gray's mental or emotional disturbance. The affidavits revealed that Gray had a psychological problem and engaged in aberrant, challenging, and confrontational behavior. Much more information about Gray's irrational and disturbed behavior was reported to defense counsel by Gray's friends, associates, and jailers, as we have already recounted. Most important, Dr. Lara, the state psychiatrist, diagnosed Gray with a mental disorder and reported that Gray may have been suffering from regression in behavior and reduced impulse control at the time of the offense, but Dr. Lara indicated that he did not have sufficient information about Gray's behavior and condition prior to the offense to make a complete assessment. Dr. Lara

offered to expand his opinion about Gray's mental condition at the time of the offense, if additional information was provided.

The dissent continues its first line of attack by claiming that the record reveals the "substantive weakness of [the] purported evidence of Gray's psychiatric impairment *prior to* the murder." *Post* at 35 (emphasis added and internal quotation marks omitted). However, the dissent later reverses itself, stating that "[a] number of lay witnesses" testified that Gray was "under significant stress and acting out of character at the time of the murder." *Post* at 45 (emphasis omitted). This testimony, such as it was, confirms that Gray's counsel had access to credible evidence that Gray suffered from a mental disturbance before the offense.[2] The post-arrest observations of Gray's jailers, friends, and counsel only serve as additional indications that Gray suffered from a preexisting mental or emotional impairment that warranted investigation, including evaluation by a mental health expert. In sum, the notice to counsel about the issue of Gray's mental condition was nothing short of glaring.

Second, the dissent contends that we, "with the benefit of hindsight, discard the high degree of deference owed to defense counsel's strategic choices,

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[2] As we explain later, the scattered trial testimony about Gray's mental state was not part of a considered mitigation strategy by Gray's counsel that centered on his mental impairment. *See infra* at 25-26. Indeed, much of this testimony was elicited by the prosecution during the guilt phase.

and replace it with an attempt to mandate that sentencing strategies in death penalty cases always include presentation of *expert* mental health testimony." *Post* at 46. The dissent misstates our position, for we do not (and could not) impose any blanket strategy requirement upon defense counsel. We simply recognize the inescapable fact that defense counsel made *no* strategic choices about whether to introduce mental health evidence because they failed to undertake a reasonable investigation in that area, notwithstanding the clear indications that such an investigation was warranted. Of course, defense counsel need not investigate for evidence of mental impairment in a case where the circumstances indicate that such an investigation would not be worthwhile. But here, as we have explained, there were multiple indications that Gray suffered from a mental impairment. *See supra* at 11-14. Gray's counsel simply ignored, or failed to appreciate the significance of, these leads.

Instead of pursuing the futile argument that Gray's counsel undertook a reasonable *investigation*, the dissent contends that we err by failing to defer to counsel's mitigation strategy for sentencing. Of course, even the dissent's attempts to put a better gloss on defense counsel's inadequate strategy cannot rectify the central problem. Counsel's failure to investigate Gray's mental health made it impossible for them to adopt a reasonably informed strategy. The failure to investigate cannot be justified. Gray's counsel never discussed or considered an investigation into Gray's mental condition during the development of Gray's mitigation case. Thus, counsel's inaction was

not based on a "reasonable professional judgment[ ]" that a mental health investigation was unwarranted. *Strickland*, 466 U.S. at 691. And, despite the dissent's assertions, the failure to investigate was not a part of any reasoned defense strategy. *See Meyer*, 506 F.3d at 370-72 (holding that counsel's performance was reasonable when he chose not to introduce mental health evidence for strategic reasons after a thorough investigation). We have no "preferred strategy" that we are attempting to impose on counsel, as the dissent charges. *Post* at 46; *see also id.* (referring to "[t]he majority's preferred strategy, concocted with the benefit of hindsight"). Nor do we adopt "a *per se* rule requir[ing] the presentment of expert mental health mitigation evidence." *Id.* at 46. Instead, we simply adhere to Supreme Court precedent and require that counsel, before settling on a sentencing strategy, make "efforts to discover *all reasonably available* mitigating evidence." *Wiggins*, 539 U.S. at 524 (internal quotation marks omitted); *see Strickland*, 466 U.S. at 690-91. Because Gray's counsel ignored numerous red flags and failed to investigate reasonably available mitigating evidence about Gray's mental impairment, we conclude that their performance was constitutionally deficient, and the state MAR court's finding to the contrary was an unreasonable application of *Strickland*.

B.

To establish *Strickland*'s second element, a petitioner must show a "reasonable probability" that counsel's deficient performance prejudiced the outcome of the case. 466 U.S. at 694. "A reasonable probability

is a probability sufficient to undermine confidence in the outcome." *Id.* In a case where counsel fails to properly investigate and develop mitigating evidence for sentencing, prejudice occurs when "the likelihood of a different result if the [missing] evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing." *Rompilla*, 545 U.S. at 393 (quoting *Strickland*, 466 U.S. at 694). The state MAR court also erred in concluding that Gray failed to satisfy *Strickland*'s prejudice requirement.

1.

In determining that counsel's performance did not cause prejudice in the sentencing phase, the MAR court held: "Even with the proffered medical testimony this Court finds it to be a leap of speculation that the jury would *necessarily* have found the existence of the statutory and nonstatutory mitigating circumstances." J.A. 1566 (emphasis added). The MAR court required *certainty* that the jury would have reached a different result at sentencing. This standard is more onerous than either the preponderance of the evidence standard rejected as too demanding by the Supreme Court in *Strickland* or the one actually adopted there. Under *Strickland* Gray is simply required to show that there is a "reasonable probability" that the missing evidence would have led the jury to "conclude[ ] that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695; *see also Woodford v. Viscotti*, 537 U.S. 19, 22-24 (2002).

Putting aside the MAR court's use of a standard that is contrary to *Strickland*, we hold that the state court's decision was an unreasonable application of the proper standard. *See* 28 U.S.C. § 2254(d). The MAR court made the very error the Supreme Court counseled against in *Williams*: "[The state court's] prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence . . . [or] reweigh[ ] it against the evidence in aggravation." *Williams*, 529 U.S. at 397-98; *see Strickland*, 466 U.S. at 695-96. The MAR court here rested its lack of prejudice determination on two findings: that the trial court submitted the mental health mitigating factors to the jury and that the state presented lay evidence that Gray did not suffer from mental impairment. However, in reaching its conclusion, the MAR court failed entirely to mention any of the mitigating evidence presented at trial, *see Williams*, 529 U.S. at 398, and improperly discounted the mitigation evidence that could have been introduced at sentencing. Further, the MAR court did not even attempt to evaluate the relative strength of the competing evidence. Because the MAR court unreasonably failed to apply the test for prejudice established by Supreme Court precedent, we must weigh the evidence of mitigation against the state's evidence of aggravation to determine whether Gray was prejudiced by his counsel's constitutionally deficient performance. Our own examination of the record persuades us that prejudice did result.

At sentencing the jury found thirteen of the twenty-one mitigating factors proffered. The jury, among the factors, determined that Gray was a loving

and dedicated father, son, and provider; that he contributed to the community as a Little League coach; that he was law abiding and posed no threat for forty-two years; that he cooperated with law enforcement; that Mrs. Gray's death was quick; and that Gray exhibited good behavior in jail. The jury, however, failed to find the two mental health mitigating factors, that Gray was under the influence of mental or emotional disturbance at the time of the offense and that his capacity to conform his conduct to the requirements of the law was impaired. In light of defense counsel's lack of focus on these factors, it is not surprising that the jury did not adopt them. Counsel did not present a cohesive case for the mental or emotional disturbance factor — indeed, it was barely mentioned in closing argument at sentencing. Worthington testified at the MAR hearing that he could not recall introducing any evidence whatsoever to support the second mental health mitigator, which was submitted solely at the instance of the trial judge.

At the MAR hearing Gray's expert on the practice of criminal law testified that "a medical witness is the most important thing you can have to support those two [mental health] mitigating factors." J.A. 1627. Evidence of mental disturbance of the type omitted at Gray's sentencing can be persuasive mitigating evidence for jurors considering the death penalty, and this evidence can determine the outcome. *See, e.g.*, *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004); ABA Guideline 5.1 cmt., 8.1 cmt., 11.8.6 cmt.; ABA Guideline 4.1 cmt. (rev. ed. 2003); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1559, 1564-65

(1998). In comparison to the other mitigating factors submitted for the jury's consideration in this case (such as that Gray "was a good and loving son," J.A. 740), the two mental health mitigating factors — largely ignored by defense counsel — were Gray's best hope of convincing the jury that he did not deserve the death penalty. The missing expert evidence on Gray's impaired mental condition would have provided the essential support for these factors.

We need not speculate about whether expert evidence would have been available if Gray's lawyers had fulfilled their duty to investigate. The lawyers had in their possession Dr. Lara's report diagnosing Gray with a mental disorder, specifically, "adjustment disorder with mixed disturbance of emotions and conduct," together with "reductions in impulse control." J.A. 45. If the lawyers had decided that Dr. Lara's initial diagnosis needed to be supplemented, he had offered to do just that. Yet Dr. Lara was not called as a witness in mitigation. In addition, counsel could have introduced expert testimony such as that of Dr. Bellard, who diagnosed Gray as having "paranoid personality disorder" and "adjustment disorder." J.A. 1743. The jury would have heard from such an expert that Gray had a severe mental illness, and that his ability to conform his conduct to the requirements of the law was "significantly impaired" at the time of the offense. J.A. 1744. The jury would have heard testimony that "if [Gray] had not had paranoid personality disorder, he would have been more likely to deal in a rational and calm manner with the problems that were facing his family." *Id.* It would have learned that Gray's disorder made him

irrationally mistrusting and "quick to counterattack," and that individuals with his disorder are prone to "psychotic episodes" when they are under severe stressors such as those faced by Gray at the time of the offense. J.A. 278-79.

This expert evidence, which was missing entirely, would have provided the jury with a medical explanation for Gray's compulsive behavior and his inability to control his reactions. The jury would have known that he suffered from a severe mental illness. In short, this evidence would have provided direct support for the two mental health mitigating factors. Given the significance of the mental health evidence, there is a reasonable probability that a competent lawyer would have introduced it at sentencing. It would have revealed no additional negative factors to the jury and would have had virtually no downside for defense strategy. *See Wiggins*, 539 U.S. at 535. Specifically, evidence of Gray's mental impairment would not have conflicted with the mitigation strategy pursued by the defense, which was essentially that Gray was a good father, son, and community member. *Id.* The mental health evidence would surely have provided a significant boost to Gray's mitigation case.

Nonetheless, the MAR court discounted Dr. Bellard's opinion, noting that (1) "Dr. Bellard's contact with defendant was six years after the murder" and (2) Dr. Bellard "had not reviewed the trial testimony . . . [which] is important to making the diagnosis arrived at by Dr. Bellard . . . [as] noted by the manual Dr. Bellard himself utilizes." J.A. 1562. The MAR court's reasoning is objectively

unreasonable. First, Gray was forced to rely on Dr. Bellard's examination six years after the offense precisely because of the deficient performance of Gray's counsel. In this circumstance, the rejection of Dr. Bellard's testimony because it was obtained belatedly would place Gray in an impossible position by prohibiting him from presenting evidence to rectify his counsel's constitutional deficiency. Such an approach would directly contravene the uncontroversial requirement that a court assessing prejudice under *Strickland* must consider admissible "mitigation evidence developed in postconviction proceedings." *Williams*, 529 U.S. at 398. Second, in suggesting that Dr. Bellard disregarded professional standards by failing to review "the trial testimony which set forth defendant's actions and conduct in the days and months leading up to the murder of Rosalyn Gray," J.A. 1562, the MAR court drastically mischaracterized the diagnostic requirements of the DSM-IV (the manual used by Dr. Bellard) as well as Dr. Bellard's testimony. The DSM-IV diagnostic criteria focuses solely on the patient's own behaviors; it nowhere states, as the MAR court asserted, that interviewing other individuals "is important to making the diagnosis." J.A. 1562. The only support for the MAR court's conclusion is Dr. Bellard's testimony that "all information would be helpful" in making a diagnosis. J.A. 1753. In fact, Dr. Bellard — who had fourteen years' experience as a clinical psychiatrist — *did* review the trial testimony of a witness, Dr. Gregory Gridley, who counseled Gray's son and interacted with the Grays socially prior to the crime. In addition, Dr. Bellard conducted a thorough examination of Gray on two occasions (finding no

evidence of malingering), reviewed Gray's trial testimony, reviewed the affidavits from Dr. Barker and Huber, and attempted to contact another witness by telephone, all before diagnosing Gray with paranoid personality disorder. Thus, clear and convincing evidence rebuts any conclusion or finding by the MAR court that the DSM-IV required Dr. Bellard to read the entire trial record or interview individuals from Gray's past prior to making a diagnosis. In sum, the MAR court's dismissal of Dr. Ballard's testimony was objectively unreasonable.

Dr. Bellard's testimony about Gray's psychiatric disorders (paranoid personality disorder and adjustment disorder) would have provided the sentencing jury with compelling support for the two mental health mitigating factors and, equally important, an explanation for Gray's aberrant behavior. Gray's entire mitigation case — with the missing expert mental health evidence included and emphasized — is thus quite powerful. We must determine, however, whether there is a reasonable probability that it would have outweighed the state's evidence in support of the death penalty. *See Strickland*, 466 U.S. at 695. The weighing process to determine the prejudice question is demanding and requires objectivity. Following the Supreme Court's approach, we can say at the outset that the state's evidence in support of the death penalty is far weaker than it was in the *Williams v. Taylor* case, 539 U.S. 510, where the Court found prejudice as a result of counsel's failure to investigate and present mitigating evidence. *See Wiggins*, 539 U.S. at 537 (noting that the petitioner in *Williams* "had savagely beaten an

elderly woman, stolen two cars, set fire to a home, stabbed a man during a robbery, and confessed to choking two inmates and breaking a fellow prisoner's jaw").

The state presented only one witness in its direct case at Gray's sentencing hearing, the court clerk who testified that Mrs. Gray had sworn out four misdemeanor warrants against Gray with a hearing date scheduled for early December 1992. The state otherwise relied on evidence from the guilt phase to support the three aggravating factors found by the jury. The state's evidence to support the first factor, that the murder was committed "to disrupt or hinder the exercise of a governmental function," was based on Gray's failure to meet discovery deadlines in the divorce case, which had prompted a court order directing him to respond. The second aggravating factor, that the crime was committed to interfere with Mrs. Gray's "exercise of her official duty as a witness" was based on the fact that Mrs. Gray had sworn out misdemeanor warrants against Gray on June 26, 1992, and that a trial was scheduled on those charges. The final factor, that the "murder [was] especially heinous, atrocious or cruel," was supported by testimony that Gray had assaulted Mrs. Gray on at least one prior occasion and that he had struggled with her before her death, inflicting noticeable marks or injuries. In addition, as the MAR court observed, the jury heard testimony from lay witnesses that Gray was "in full control of his mental faculties" at the time of the crime. J.A. 1566. These witnesses admitted, however, that Gray's behavior was erratic and overly emotional.

The jury did not have the opportunity to weigh the aggravating factors and adverse lay testimony against the powerful expert mental health evidence that could have been placed in the balance with the thirteen mitigating factors that were established. The evidence of Gray's serious mental illness would have given the jury the full picture of Gray and his crime, including the fact that he was acting under a severe mental or emotional disturbance and with impaired capacity when he killed his wife.

We have reviewed the evidence on both sides, and we conclude that "had the jury been able to place [Gray's mental disturbance] on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537. There is, in other words, "a reasonable probability that [the jury] would have returned with a different sentence." *Id.* at 536. Gray has therefore established prejudice as a result of his counsel's inadequate performance with respect to sentencing, and a new sentencing hearing is warranted.

2.

The dissent acknowledges, as it must, that the MAR court "fail[ed] to engage in an explicit reweighing of all available mitigating evidence." *Post* at 48. Nonetheless, the dissent attacks our reasoning on several grounds, constructing its own arguments rather than relying on the MAR court's analysis. First, and foremost, the dissent declares that the MAR court made no legal error in avoiding the reweighing

process because such an attempt would have been "farcical" after it found the testimony of Dr. Bellard to be "unpersuasive." *Id.* As we have explained, the MAR court's bases for discounting Dr. Bellard's opinion were objectively unreasonable. *See supra* at 22-23. Moreover, regardless of the MAR court's assessment of Dr. Bellard's opinion, the court erred in its application of *Strickland* and *Williams* by failing to reweigh the totality of the evidence. Instead, its prejudice determination consists of a single, conclusory sentence. The Supreme Court makes clear that, in assessing prejudice, a state court may not simply draw a conclusion with no reviewable reasoning. Instead, the Court has repeatedly emphasized that it is essential that a court "evaluate the totality of the available mitigation evidence — both that adduced at trial, and the evidence adduced in the habeas proceeding — in reweighing it against the evidence in aggravation." *Williams*, 529 U.S. at 397-98. Because mental health testimony was not presented at trial and was properly presented to the MAR court, the MAR court unreasonably applied Supreme Court precedent by failing to reweigh the evidence. *See id.*

Second, in a further sign that the dissent finds no support in the MAR court's analysis, the dissent argues that we "fail[ ]to recognize the centrality of . . . abundant *lay* witness testimony to defense counsel's mitigation theory," which "focus[ed] on Gray's mental and emotional stress." *Post* at 50. The dissent is mistaken. The record reveals that Gray's counsel did not present (or attempt to present) *any* evidence at sentencing that Gray suffered from a mental impairment. As we have discussed above, Gray's

counsel neither investigated, nor adopted a strategy relating to, Gray's mental health. Worthington's admissions at the MAR hearing directly contradict the dissent's characterization of lay mental health testimony as "abundant" and "central" to what the dissent claims was a "focused" defense strategy. *Id.* In discussing the mitigating factor that Gray was under the influence of mental or emotional distress, Worthington recalled that the only evidence offered was the "testimony in the trial of . . . a friend of [Gray's] . . . and I'm not for sure, I think that [Gray] testified that he was under emotional distress." J.A. 1658-59. Worthington could not recall offering any evidence in support of the mitigating factor that Gray's capacity to conform his conduct to the law was impaired.

Although Gray's counsel admitted to eliciting only limited testimony about Gray's emotional distress, some witnesses nonetheless mentioned his instability. Much of this testimony, however, was in response to questioning by the prosecution, not Gray's counsel. The trial court recognized that there was limited evidence about Gray's mental state, but it allowed the mental distress mitigating factor to be submitted to the jury "out of an abundance of caution." J.A. 1366. Worthington made a passing (two-sentence) mention of only one of the mental health mitigators in his closing argument, stating: "You heard Charles Buchanan, a life-long friend talk about Mr. Gray's mother, and this is the mitigating factor, the felony was committed while the defendant was under the influence of mental or emotional distress. The mother hospitalized and he was distressed during the month

of November." J.A. 1430-31. In sum, the dissent is wrong to say that there was "abundant lay testimony" about Gray's mental health. More important, there is no support for the argument that Gray's counsel adopted or pursued a mitigation theory related to Gray's mental impairment.

Third, the dissent argues that any expert mental health testimony would have been double-edged. In reaching this conclusion, the dissent relies on Dr. Lara's report and fails to recognize the obvious implications of Gray's counsel's deficient performance. If Gray's counsel had undertaken a reasonable investigation after reviewing the report, they would have provided Dr. Lara with the additional information he requested for a complete assessment of Gray's mental health at the time of the offense. Dr. Lara's report thus is not an endpoint in expert evidence, as the dissent would have it, but a beginning that should have indicated to counsel that further investigation was necessary. A proper investigation and evaluation of Gray's mental health would have provided a diagnosis such as that of Dr. Bellard that could have been introduced at sentencing. There is no double edge to this evidence because Dr. Lara's report explicitly left room for a more informed assessment, and the inclusion of either expert's final opinion would not have undermined Gray's defense strategy. *See Bowie v. Branker*, 512 F.3d 112, 121 (4th Cir. 2008); *Moody*, 408 F.3d at 152.

Finally, the dissent faults us for "cast[ing] aside the MAR court's opinion and conduct[ing our] own analysis," claiming that our "doe-eyed view" of the

missing evidence "unsurprisingly" leads us to our "preferred result" (a new sentencing hearing). *Post* at 53, 49, 53. The MAR court, by failing to conduct its own proper analysis, left us with no choice but to undertake our own independent review of the record. In undertaking that review, we have not, as the dissent freely charges, "manufacture[d] a hypothetical expert super-witness," *post* at 53 n.16, or fashioned a "mitigation case of [our] own making," *id.* at 53. Instead, we have conducted a straightforward and dispassionate review of the record, which includes the evidence developed by Gray's post-conviction counsel and presented to the MAR court. This detailed review, which is set forth above, establishes a reasonable probability that deficient performance by Gray's counsel led to his sentence of death. Because "the likelihood of a different result if the [missing mental health] evidence had gone in is sufficient to undermine confidence in the outcome actually reached at sentencing," *Rompilla*, 545 U.S. at 393, a new sentencing hearing is required.

IV.

Gray also contends that his right to effective counsel was violated because Worthington, his lead counsel, failed to withdraw despite an actual conflict of interest. Gray argues that Worthington should have withdrawn in order to testify as to Gray's plan for complying with court ordered discovery in the divorce proceeding. The Sixth Amendment right to counsel is violated when the defense lawyer has an actual conflict of interest that "adversely affect[s] [the] lawyer's performance." *Cuyler v. Sullivan*, 446 U.S.

335, 348 (1980). When this situation occurs, prejudice is presumed. *Id.* at 349-50; *Mickens v. Taylor*, 535 U.S. 162, 173 (2001).

Here, the MAR court applied the *Cuyler v. Sullivan* test, as adopted by the Supreme Court of North Carolina in *State v. Walls*, 463 S.E.2d 738 (N.C. 1995), and concluded that even if there was a conflict of interest, Worthington's failure to withdraw had no adverse effect on his representation of Gray. The court based its conclusion on several findings, including that Worthington was retained as Gray's divorce lawyer only shortly before Gray's arrest for his wife's murder; that when the murder case arose, Worthington had not yet begun working on the divorce case and had no substantive knowledge about it; and that Worthington's testimony about the divorce case would have been duplicative of other defense testimony. Gray has not rebutted any of these findings by clear and convincing evidence, so we presume them to be correct. 28 U.S.C. § 2254(e)(1). The MAR court's decision on this conflict of interest claim did not involve an unreasonable application of *Cuyler v. Sullivan*, *see* 28 U.S.C. § 2254(d)(1), and we accordingly reject the claim.

V.

Gray further contends that the district court erred in denying his claim, asserted by amendment to his federal petition, that Worthington labored under a second conflict of interest after he (Worthington) was shot by his wife. The conflict arose, according to Gray, because "Worthington was implicated in the same type

of [domestic conflict] as Gray, and [Worthington's] wife was being criminally prosecuted in the same jurisdiction by the same authorities." Appellant's Br. 57. After raising the issue on its own motion, the district court held that this claim is barred by AEDPA's one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(l)(A) (imposing a one-year limitation for filing that runs from "the date on which the [state court] judgment became final by the conclusion of direct review or the expiration of the time for seeking such review"). As part of its ruling, the court determined that the claim, asserted by amendment, could not be saved by relation back to the original petition. Gray argues that the district court erred (1) by improperly raising the limitations issue on its own motion and (2) in concluding that the amendment did not relate back to the original petition. (Gray concedes that if the amendment does not relate back, it is time barred under AEDPA.) We review the district court's determination on these matters for abuse of discretion. *See Day v. McDonough*, 547 U.S. 198, 202 (2006); *United States v. Pittman*, 209 F.3d 314, 316 (4th Cir. 2000).

In *Day v. McDonough* the Supreme Court held that a district court has the discretion, but not the obligation, to consider on its own motion the timeliness of a habeas petition under AEDPA if (1) the parties have fair notice and an opportunity to be heard; (2) the state has not waived the limitations defense; (3) the "petitioner is not significantly prejudiced by the delayed focus on the limitation issue"; and (4) the court "determine[s] whether the interests of justice would be better served by addressing the merits or by

dismissing the petition as time barred." 547 U.S. at 209-11 (quotation marks and citations omitted). In this case the district court allowed the parties to be heard, and, after considering each of the preliminary factors listed in *Day*, concluded that justice would be better served if the court addressed the statute of limitations issue.

The district court then proceeded to consider whether the amendment's claim — that Worthington had another conflict of interest once he was shot by his wife — related back to the original petition. *See* Fed. R. Civ. P. 15(c)(2). An amendment to a habeas petition relates back under Rule 15(c)(2) when the new claim arises from the "same core facts [in time and type] as the timely filed claims." *Mayle v. Felix*, 545 U.S. 644, 657 (2005). Applying this standard, the district court concluded that Gray's amendment did not relate back to the original petition and was therefore time barred.

Gray alleged in his original petition that Worthington was conflicted because of his inability to testify to Gray's intention to comply with the discovery order in his divorce case. In the amendment Gray alleges the facts surrounding Worthington's shooting, but a review of those facts reveals that they support a separate conflict of interest claim. As the district court concluded, although these new facts support the broad contention that Gray was deprived of conflict-free counsel, they arise from an entirely separate factual circumstance and create a new and distinct claim for relief. Because the district court did not abuse its discretion in considering the limitations issue or in concluding that the conflict of interest amendment did

not relate back, we affirm the dismissal of this amendment as time barred.

VI.

Gray also contests the district court's dismissal of his amendment adding an ineffective assistance of counsel claim based on counsel's failure to investigate and present expert testimony to rebut the state's forensic evidence with respect to the cause of a blunt force injury to Mrs. Gray's face. The state asserted that this claim was barred by AEDPA's statute of limitations, and the district court held that it did not relate back to the original petition and dismissed it on limitations grounds. Gray concedes that the amendment did not relate back, but argues for the first time on appeal that ineffectiveness of postconviction counsel constitutes cause for his failure to present this issue in state court and in his original federal habeas petition. This argument is foreclosed by our decision in *Mackall v. Angelone*, 131 F.3d 442 (4th Cir. 1997). In *Mackall* we held that ineffective assistance of counsel in state habeas proceedings does not constitute cause for failure to assert a claim on a timely basis. *Id.* at 449. Gray cannot distinguish his case from *Mackall* because he, like the petitioner in *Mackall*, asserts that his claim would have been raised but for counsel's deficient performance in state post-conviction proceedings. Because *Mackall* controls, we must conclude that the district court properly dismissed Gray's additional ineffective assistance of counsel claim as barred by the statute of limitations.

VII.

We reverse the judgment of the district court to the extent it denies the writ of habeas corpus to William Robert Gray, Jr., on his claim of ineffective assistance of counsel at the sentencing phase of his case. The remainder of the district court's judgment is affirmed. On remand the district court will grant the writ of habeas corpus unless the State of North Carolina affords Gray a new sentencing hearing within a reasonable time.

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED

DUNCAN, Circuit Judge, concurring in part and dissenting in part:

Most habeas petitioners recount, as background to their claims of ineffective assistance of counsel, stories of childhood trauma and horrific mistreatment. Not so here. Petitioner William Robert Gray, a prosperous professional with *retained* counsel, was the abuser, not the abused.

After stalking his estranged wife for months, Gray shot her to death in the driveway of his home as she begged a passerby, "Mister, please don't leave. If you leave, he'll kill me." *State v. Gray*, 491 S.E.2d 538, 544 (N.C. 1997). Gray then entered his home and conscripted his children, ages eight and eleven, in his scheme to lie to authorities about what happened.

Gray promptly retained counsel, to whom he strenuously insisted that he suffered from no psychological infirmities. Counsel nevertheless had Gray committed to Dorothea Dix Hospital for a psychological evaluation. After observing and evaluating Gray for several weeks, hospital staff found no signs that Gray was suffering from a mental illness at the time of the murder. To the contrary, a hospital physician opined that Gray's condition at the time of the murder "did not impair his basic understanding of the nature and quality of his actions nor his ability to recognize right from wrong." J.A. 252. Ignoring the advice of his retained counsel, Gray refused to authorize funds for additional psychiatric examinations or testing. In spite of the attempts made by counsel and Gray's unilateral refusal, Gray later sought collateral relief from his death sentence on the basis that his counsel provided ineffective assistance by failing to adequately investigate his mental health condition in preparation for sentencing. The North Carolina MAR court, closely reviewing Gray's claim, found neither deficient performance nor prejudice.

Now, based primarily on a single assessment six years after the fact, and relying in part on the legally irrelevant state of Gray's mind *after* the murder, the majority indefensibly concludes that the strain of marital difficulties (the effects of which were borne in large measure by Gray's wife) might have driven Gray inexorably towards uxoricide. In doing so, the majority accords no deference whatsoever to the reasoned decision of the MAR court, instead dismissing that court's findings based on no more than its contrary belief, unsupported by the record, that expert

mental health evidence regarding the psychological effects of marital strife upon Gray might have made the difference between sentences of life and death. AEDPA, the statute that expressly controls our review of such claims, specifically prohibits the majority's wholesale rejection of the state court findings of fact and conclusions of law.

Because the majority opinion contravenes AEDPA's standard of review, mischaracterizes record evidence, and ignores Supreme Court and Fourth Circuit precedent, I am compelled to dissent.

I.

Before discussing the majority's legal errors, it is first necessary to highlight some of the liberties it takes with the facts. The majority inflates the importance of affidavits submitted by two doctors, neither of whom evaluated Gray; relies heavily on a single psychiatric evaluation that occurred a full six years after the murder; and glides over the eminently reasonable course of action undertaken by Gray's counsel.

It is probably fair to say, and I doubt the majority would disagree, that Gray was a boorish person. The record reflects that he abused his wife, manipulated his children, was "challenging, confrontational, arrogant and haughty" in counseling, J.A. 227, and, when the marriage disintegrated, attempted to extract negative information about his wife from her doctor for use in the couple's ongoing divorce proceeding. What is missing on this record is any evidence that these

actions, or the murder itself, were products of impaired capacity or a diagnosable mental illness.

Indeed, evidence abounds to the contrary. Following an evidentiary hearing, the state MAR court found persuasive testimony that Gray "was calm, in control, and conducted himself normally as a person in 'their right mind' throughout the period of the contentious divorce proceedings and up to the murder itself." J.A. 1563. The MAR court cited the testimony of no fewer than seven witnesses who, the court found, "offered first-hand observation and experience with [Gray] in the days and months *preceding* the murder of [his] wife." J.A. 1564 (emphasis added). The court also placed weight on the statement of Gray's attorney that he would not have allowed Gray to be interviewed by the police on the night of the murder if he had harbored questions about Gray's mental stability. J.A. 1564.

In the face of the MAR court's clear and cogent explication of the record, the majority ignores AEDPA's deferential standard of review and resorts to mining the record for some indication that Gray's evils could have been explained away by psychological factors.

The contrived nature of the majority's support for its conclusions regarding Gray's mental condition is nowhere more apparent than in its reliance on a single sentence, taken out of context, from an affidavit sworn out by Dr. Marshall Barker, Gray's wife's gynecologist, in the couple's divorce proceeding. In his affidavit, Dr. Barker stated:

> Dr. Gray persistently called me and made appearances in my office on numerous occasions to discuss my treatment of his wife. Despite my informing him that such discussion would violate physician/patient confidentiality, he continued to make calls and appearances in my office demanding information about his wife. I realized that by his persistence in making appearances and telephone calls, *he was trying to gather negative information on his wife. I can see from Dr. Gray's behavioral pattern that the behavioral aberration and psychological problem is with him and not his wife.*

J.A. 224 (emphasis added). On cross-examination, Dr. Barker admitted that his *personal* interactions with Gray were limited to one telephone conversation lasting approximately twenty minutes. J.A. 789-90. Despite the fact that the reason for the conversation was for Gray to gather negative information about his wife from her gynecologist, the majority would rather use Dr. Barker's "training in psychology" to inflate the significance of his statements about Gray's "psychological problem." *See* Majority Op. at 3; J.A. 224.[1]

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[1] The actual facts of record put the majority's spin in proper context. Dr. Barker's "training in psychology" involved taking some number of unspecified "courses dealing with psychology" and attending a conference on domestic violence. *See* J.A. 780.

The majority further characterizes Dr. Barker's opinion as suggesting that Gray's psychological issues "included obsessive

compulsion." Majority Op. at 3. Significantly, it offers no citation to any such diagnosis, perhaps because there was none. In fact, the only commentary remotely along those lines occurred in the following portion of Dr. Barker's testimony on direct examination, and it can hardly be characterized as a diagnosis:

> Q. Dr. Barker, at the time you were speaking to the defendant, did you formulate any opinion to yourself whether or not he was in control of his mental and physical faculties at those times? Yes or no.
>
> A. He was— Yes. He was in control of his faculties.
>
> Q. Your opinion was what?
>
> A. My opinion that he— if you're asking me is he— was this— If you're asking me, over a telephone conversation, did this seem delusional or psychotic, I'm telling you no, it did not.
>
> Q. Did he appear— did you formulate an opinion satisfactory to yourself, other than the agitation, he appeared and sounded to you like he was in control of his mental faculties?
>
> A. I felt he was in control of his mental faculties. He just sounded to me very obsessively compulsive about this situation.

J.A. 789. The only objectively accurate characterization of this colloquy is that it reflects Dr. Barker's view of Gray as mentally sound, but perhaps "obsessively" focused on the marital deterioration for which he bore primary responsibility. However,

The majority also relies on an affidavit filed by Ms. Marilyn Huber, the Grays' marital and family therapist. This affidavit, like Dr. Barker's affidavit, is irrelevant to the issue of Gray's mental health. The affidavit concerned Dr. and Mrs. Gray's marital counseling sessions. In the majority's view, it was significant that during these sessions Ms. Huber found Mrs. Gray's behavior "entirely appropriate," and Dr. Gray's, by contrast, "challenging, confrontational, arrogant and haughty." J.A. 227; *see* Majority Op. at 3, 16. Dr. Gray's behavior led Ms. Huber to discontinue their counseling sessions and led her to suggest that Mrs. Gray get psychological counseling for the children "to help them deal with the dissolution of the marriage and the possible pressure . . . being asserted upon them by their father." J.A. 227-28.

In an effort to give these affidavits significance they do not have, the majority skews some facts and takes others out of context. For instance, it is correct that Mrs. Gray's divorce lawyer relied on the affidavits in moving for a court order "for a mental assessment of Gray." Majority Op. at 3. What the majority fails to disclose, however, is that the motion requested that *both* Dr. and Mrs. Gray, as well as their children, be required to submit to mental and physical assessments. Far from serving as evidence of Dr. Gray's psychological condition, the motion is, on its face, no more than an attempt by the attorney for a

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as with the majority's factual characterizations throughout, its observations here reflect the strain of its efforts to create evidence of a mental disorder that does not exist.

non-custodial parent in a divorce proceeding to protect his client from attacks on *her* psychological well-being.

Of course, I agree with the majority that the affidavits could be probative of Gray's counsel's performance to the extent that they raised "red flags" that counsel should have seen, but did not. *See id.* at 12. But a fair reading of the affidavits, as detailed herein, leads to the conclusion that they fail to carry the weight the majority lades them with; no reasonable reading of the affidavits could support the majority's self-serving conclusions that they "were . . . indications of Gray's mental or emotional disturbance" and that they "revealed that Gray had a psychological problem." *Id.* at 16.

Due to the substantive weakness of this purported evidence of Gray's "psychiatric impairment" *prior to* the murder, the majority is forced to rely on events *after the murder and Gray's subsequent arrest.* Gray was placed on suicide watch; fainted during a friend's visit; was described by friends as "damaged emotionally," J.A. 884, and by the jail matron as "VERY depressed," J.A. 889-90; and was described by his own attorney as "dazed" and "appear[ing to be] in a state of shock," J.A. 240, 1702.[2] None of these reactions can legitimately be called unnatural or

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[2] Although the attorney wrote in his commitment motion that Gray appeared "unable to understand the gravity of the situation," J.A. 240, he later clarified that he "had no doubts in my mind that [Gray] knew what was going on,' but that Gray "looked haggard, worn, worn out, tired, frustrated, and kind of a realization that I'm in trouble. I mean it's dazed like you know, I'm realizing hey, this is serious," J.A. 1702-03.

unexpected for a man just arrested for the brutal murder of his wife. Instead of recognizing this, however, the majority warps time in lumping these post-arrest behaviors into its standardless framework for analyzing Gray's mental health condition *prior to* the murder.

In any event, far from behaving ineffectively, Gray's counsel responded immediately to the concerns raised by these post-arrest behaviors, requesting that his client be committed to Dorothea Dix Hospital to evaluate his capacity to proceed to trial.[3] Gray was subsequently evaluated over the course of several weeks by hospital staff. He presented originally as "tearful, upset, and anxious," oppositional and challenging at times, and angry and frustrated when describing his wife's past behavior. J.A. 245-47. He was resistant to testing, refused to cooperate in many procedures, and displayed arrogance and verbal aggression towards hospital evaluators. The hospital's

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[3] The majority takes Gray's counsel to task for failing to provide affidavits from Gray's pending divorce case file to the staff at Dorothea Dix. *See* Majority Op. at 5. Again, a closer look at the surrounding facts demonstrates the reasonableness of counsel's actions. The case file in question was delivered to one of Gray's trial attorneys a mere eleven days prior to the murder, when he was retained to represent Gray in the divorce case. The attorney had no occasion to review the case file prior to the murder—he and Gray had arranged to go over the file the weekend *after* Thanksgiving, but Gray murdered his wife the night *before* Thanksgiving. Unlike the majority, I find nothing condemnable about an attorney's failure to immediately review a client's divorce case file after that client moots the case by brutally murdering his wife, or his failure to extract from such a file affidavits of dubious relevance to his client's mental health.

initial diagnostic impression of Gray was that he "presented an adjustment reaction with mixed disturbance of emotions and conduct in relation to current ongoing stress." J.A. 246. However, after dealing with Gray for several weeks, the hospital's clinical findings indicated "no evident psychosis nor any impairment in this patient's ability to understand his situation and surroundings," and "no findings to suggest evidence of ongoing medical illness." J.A. 251. Dr. Patricio Lara, the forensic psychiatrist who completed Gray's discharge summary, concluded his analysis and opinion as follows:

> Available information describing this patient's condition around the time of the incident in question indicate that he was under ongoing stress related to his family and marital situation. Observations reported by friends describe evidence of preoccupation and distress *and no features to indicate confusion nor any serious impairment in this patient's ability to function.* Based on available information, it is my opinion that this patient's condition at the time in question *did not impair his basic understanding of the nature and quality of his actions nor his ability to recognize right from wrong.* The magnitude of ongoing stressors may have contributed to regression in behavior and reductions in impulse control and control of emotions.

J.A. 252 (emphasis added). Dr. Lara then noted that Gray was, *at the time the evaluation was completed,* "undergoing [a] significant amount of distress and

could benefit significantly from psychiatric counseling." J.A. 252-53.[4]

Dr. Lara concluded the discharge summary with the following statement, which the majority attempts to imbue with significance: "If other sources of information become available to describe this patient's functioning and condition prior to [the murder], I would be glad to review the information to expand my opinions if possible in regards to this patient's condition at the time of the alleged offense." J.A. 253; *see* Majority Op. at 5, 12, 13, 15, 16, 21, 26 (referring to this statement as, among other things, an "offer" to provide "additional assistance" and an "offer of mental health investigation assistance"). The limits of this comment should be readily apparent. It suggests only a willingness to revisit the diagnosis of "no impairment" should additional evidence be forthcoming.[5]

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[4] Once again, the majority conflates observations related to Gray's post-arrest behaviors with his condition prior to the murder. It should surprise no one that Dr. Lara suggested psychiatric counseling for Gray after his arrest for the brutal murder of his wife, and that Dr. Lara indicated that Gray, in his post-arrest condition, might benefit from medication.

[5] The majority also relies on the assertion that Dr. Lara's assistance would have been given "free of charge." Majority Op. at 13, 15. The only support for this assertion is Dr. Lara's affidavit, executed on June 7, 2006, thirteen years after Gray's trial and six years after the MAR proceedings. This affidavit was considered by neither the MAR court nor the district court and should not have been considered by this court on habeas review. *See Bell v. Jarvis*, 236 F.3d 149, 171 n.13 (4th Cir. 2000).

The one potential "red flag" to be found in the hospital discharge summary was nonspecific and equivocal: "The magnitude of ongoing stressors *may have contributed* to regression in behavior and reductions in impulse control and control of emotions." J.A. 252 (emphasis added). Contrary to the majority's repeated reference to the "many signs" of Gray's mental or emotional instability, there were in fact few, if any, facts in this record that might have led a reasonable attorney to believe that Gray was laboring under a diagnosable mental or emotional impairment at the time that he murdered his wife.

After reviewing the Dorothea Dix discharge summary, Gray's attorney recommended that they retain an independent psychiatrist to evaluate Gray and to be on standby for the trial and, if necessary, sentencing. J.A. 1660, 1663-64. Gray refused, telling his paid attorney "not to spend another f'ing penny on this trial, [and] that he didn't need a psychiatrist." J.A. 1666. Gray forbade his attorney to retain an independent psychiatrist and declined to authorize the expenditure of funds for a psychiatrist, even though he had authorized funds for other experts, including a surveyor and an expert on jury selection. J.A. 1665-66.

Faced with an absence of evidence from the time period leading up to the murder that Gray suffered from a diagnosable mental or emotional disorder, and counsel's appropriate response to the circumstances at the time, the majority is forced to rely on the opinion of a doctor hired six years *after* the murder to support the conclusion it seeks—that Gray suffered from a

mental illness or acted with impaired capacity when he killed his wife.

Gray was sentenced to death in December 1993. The testimony and affidavit of Dr. James Bellard, a psychiatrist, were submitted at the MAR hearing in 1999. Dr. Bellard interviewed Gray for a total of four hours in January 1999. He reviewed only the records of the Grays' family and marital therapist, the discharge summary from Dorothea Dix, and the North Carolina Supreme Court holdings in Gray's case. (Bellard Aff., J.A. 275.)[6] Based on this limited information, Dr. Bellard opined that Gray "did at the time of the offense . . . and does at the current time suffer from a psychiatric illness, specifically, Paranoid Personality Disorder (DSM Code 301.0)." *Id.* Dr. Bellard further offered his opinion that Gray might suffer from other psychiatric disorders and that expert psychiatric testimony would have been useful to the jury in Gray's case because it would have supported the submission of at least two statutory mitigating factors. J.A. 275-76.[7]

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[6] The majority again engages in judicial puffing when it states that Dr. Bellard "reviewed excerpts of the trial record." Majority Op. at 8. Dr. Bellard reviewed the testimony of only *one* witness—Dr. Gridley, Gray's son's counselor—and the testimony of Gray himself. J.A. 1752, 1756. Tellingly, Dr. Bellard's affidavit, which detailed the bases for his psychiatric opinion, did not even mention these trial record excerpts.

[7] The factors Dr. Bellard noted were that "the capital felony was committed while the defendant was under the influence of mental and emotional disturbance," and that "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law

The state MAR court reasonably discounted Dr. Bellard's testimony both because his contact with Gray occurred six years after the murder and because Dr. Bellard had not reviewed the trial testimony of Gray's friends, relatives, and associates describing Gray's conduct in the months leading up to the murder. J.A. 1562-63. Relying on extensive evidence and testimony of no fewer than seven witnesses with knowledge of Gray's behavior *prior to* and *at the time of* the murder, the MAR court concluded that available evidence, including both the evidence actually presented at sentencing and that which Gray contended should have been presented but was not, demonstrated that Gray was in full control of his mental faculties and his ability to reason at the time of the murder. J.A. 1566. To conclude that the result of Gray's trial would have been different if the "missing" evidence had been presented, the MAR court held, would require "leap[s] of speculation." *Id.* The court therefore rejected Gray's ineffective assistance claim, finding that he had failed to show either that his attorney's performance was deficient or that any deficiency resulted in prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

II.

The serious errors in the majority's cavalier recitation of the facts are compounded by its perplexing legal analysis. Though the majority sets forth the proper framework for AEDPA review, it wholly disregards its application.

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was impaired." J.A. 276.

Federal habeas relief is available to state prisoners only when state court proceedings (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court decision is "contrary to" established federal law if the state court "applies a rule that contradicts the governing" Supreme Court precedent or confronts facts that are "materially indistinguishable" from those presented in a relevant Supreme Court decision and arrives at the opposite result. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).

An "unreasonable application" of clearly established federal law "occurs when a state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of [a] petitioner's case." *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (internal quotations omitted). To warrant the extreme remedy of federal intrusion into state criminal adjudications, it is not enough "[that] a federal court believes the state court's determination was incorrect"; the relevant question is "whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 127 S. Ct. 1933, 1939 (2007) (citing *Williams*, 529 U.S. at 410). In habeas cases,

> [f]actual determinations by state courts are presumed correct absent clear and convincing

> evidence to the contrary, and a decision adjudicated on the merits in state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding.

Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). Accordingly, this court has recently reaffirmed that "federal courts are to accord considerable deference to state courts in their review of state habeas proceedings." *Meyer v. Branker*, 506 F.3d 358, 365 (4th Cir. 2007) (citing *Williams*, 529 U.S. at 412-13).

III.

The crux of Gray's petition is his ineffective assistance of counsel claim. To prevail on such a claim under *Strickland*, a petitioner must establish both that counsel's performance was deficient and that the deficiency prejudiced the defense. 466 U.S. at 687. The majority concludes, as it must in order to grant relief, that the North Carolina MAR court engaged in an unreasonable application of Supreme Court precedent concerning *both* components of *Strickland*. The majority first holds that Gray's counsel rendered deficient performance "by failing to investigate and develop, for sentencing purposes, evidence that Gray suffered from a severe mental illness." Majority Op. at 2. This portion of the majority opinion is grounded in its determination that Gray's attorneys' investigation was "unreasonable under prevailing professional norms." *Id.* at 16.

After arriving at its conclusion regarding deficient performance, the majority further concludes that there is a reasonable probability that this failure prejudiced the outcome at sentencing. *Id.* at 24. In the majority's view, the MAR court applied the wrong standard for evaluating prejudice, and the MAR court's decision was an "unreasonable application of the proper standard." *Id.* at 19. I find each of these holdings to strain reason and confound well-established law.

A.

The precedents governing our analysis of *Strickland*'s deficiency prong are clear. An attorney's performance is measured using the standard of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. "American Bar Association standards and the like . . . are guides to determining what is reasonable." *Id.* The Supreme Court has made clear that ABA standards such as the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guidelines") are "*only* guides," not requirements. *Id.* (emphasis added); *see also Rompilla*, 545 U.S. at 400; *Wiggins v. Smith*, 539 U.S. 510, 543 (2003). Other guides might include, but are not limited to, state-specific standards and the actual courtroom practice of capital defenders in the relevant jurisdiction or nationwide. *See Marshall v. Cathel*, 428 F.3d 452, 467-68 (3d Cir. 2005). In utilizing any guide to determine reasonableness, *Strickland* requires courts to be "highly deferential" to attorneys' strategic choices to avoid the "distorting effects of hindsight." 466 U.S. at 689. This court recently explained,

> In the sentencing context, this "highly deferential" standard means that defense counsel have the flexibility to vary their approach given their client's unique circumstances. *See Lovitt v. True*, 403 F.3d 171, 179 (4th Cir. 2005) ("In many cases, counsel's decision not to pursue a particular approach at sentencing reflects not incompetence, but rather a sound strategic choice."). This is exactly as it should be: the touchstone of effective representation must be sound, evidence-based judgment, *rather than a set of mandates counsel must programmatically follow without deviation.* "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 688-89.

Meyer, 506 F.3d at 371 (emphasis added).

The majority wisely concedes that the ABA Guidelines provide only advice and suggestions of "avenue[s] of investigation that counsel *should* consider," and that in this context they "can be relevant" to determinations of what constitutes reasonable performance but "certainly cannot be dispositive in and of themselves." Majority Op. at 11 (citing *Meyer*, 506 F.3d at 372.) (emphasis added). In doing so, the majority recognizes the Supreme Court's admonition that programmatic rules "would interfere

with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause." *Strickland*, 466 U.S. at 689 (internal citation omitted).

Nevertheless, by finding that an in-depth mental health investigation was required on these facts, the majority effectively calls for a per se rule that such an investigation is required in *every* death penalty case, a result both this court and the Supreme Court have expressly rejected. *See Meyer*, 506 F.3d at 371-72; *Strickland*, 466 U.S. at 689.

The majority's opinion "ignore[s] the very basic fact that different circumstances often require different strategies." *Meyer*, 506 F.3d at 372; *see Strickland*, 466 U.S. at 689; *Frye v. Lee*, 235 F.3d 897, 904 n.7 (4th Cir. 2000). Here, defense counsel, facing the circumstances presented in Gray's case, attempted to demonstrate at sentencing that Gray, after a lifetime of good behavior, made a tragic mistake in a moment of weakness due to the dissolution of his marriage and the hospitalization of his mother. *See* J.A. 1439 (defense counsel's statement during closing argument that "overall, [the jury will] be looking at a few days in 1992 versus a whole life time of 42 plus years"); J.A. 1442 (closing argument statements contrasting a lifetime of conforming to society's rules with a few "non-conform[ing]" events).[8] The mental or

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[8] Much of the testimony at the sentencing hearing

emotional disturbance mitigating factor played a role in this overarching theory, as elucidated by the jury instruction suggested by counsel, J.A. 1455, and the similar instruction ultimately given by the court:

> For this mitigating circumstance to exist it is enough that the defendant's mind or emotions were disturbed from any cause and that he was under the influence of the disturbance when he killed the victim.
>
> You would find this mitigating circumstance if you find that the defendant was under mental or emotional stress as a result of his break up—the break up of the family marital unit and/or the mental or emotional stress of the hospitalization of his 82-year-old-blind mother and the uncertainty of her prognosis; and that as a result of this, the defendant was under the influence of mental or emotional disturbance when he killed the victim.

J.A. 1475-76.

Defense counsel's approach met with some success, leading the jury to find thirteen of the twenty-one mitigating factors proffered, including that Gray was a loving father, a loving son who had cared for his mother at her time of need, a contributor to the

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supported this theory by highlighting the strength of the Grays' marriage in its early years, Gray's excellent work in his career as a dentist, and Gray's dedication to his children as a little league coach and a loving father.

community, and that "[f]or 42 years prior to his separation from Roslyn Gray, Defendant led an uneventful, law-abiding life posing no threat to his family or community." J.A. 740. The jury did not find the mental health mitigating factors, and it ultimately recommended death. However, that defense counsel did not prevail in avoiding a death sentence does not transform its mitigation strategy into ineffective assistance. *See Strickland*, 466 U.S. at 689 ("It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable."); *Lovitt*, 403 F.3d at 179 (noting that, to pursue a particular theory at sentencing, though it may ultimately fail, often "reflects not incompetence, but rather a sound strategic choice").

The diligence and cautiousness of Gray's counsel bear repeating. They began their investigation immediately after the murder by having Gray committed for a weeks-long evaluation at Dorothea Dix Hospital. They later made the reasonable choice to forgo additional in-depth mental health investigation based on Dr. Lara's evaluation and their overall assessment of the case, including all available evidence, their own observations of their client, and their client's refusal to authorize funds for experts and his insistence that further psychiatric evaluation was unnecessary.[9]

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[9] Of course, counsel cannot blindly accept a client's opinion regarding his own mental health as fact. But it would be

The circumstances here did not demand that Gray's sentencing strategy include procuring expert mental health testimony. Gray's initial psychiatric evaluation found no evidence of impairment at the time of the murder. Gray's attorneys nevertheless approached Gray about hiring a mental health expert to be "on standby," though they did not necessarily intend to use psychiatric evidence. When Gray refused to authorize funds for such an expense, they did not press the matter. "[S]trategic choices made after less than complete investigations are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins*, 539 U.S. at 533. Contrary to the majority's analysis, a fair reading of this record leads to the inescapable conclusion that the investigation undertaken by Gray's counsel was reasonable.[10]

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equally suspect for an attorney to ignore a client whose self-assessment found abundant support and minimal contraindication in the record and comported with the attorney's own reasoned judgment. *See Strickland*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.").

[10] Inexplicably, the majority mischaracterizes my opinion as failing to "pursu[e] the . . . argument that Gray's counsel undertook a reasonable *investigation*." Majority Op. at 18. But this is precisely the argument I am making—that counsel's investigation was, *under the circumstances known to him at the time*, reasonable.

Counsel's reasonable performance continued at sentencing. The majority is simply incorrect in asserting that "Gray's counsel did not present (or attempt to present) *any* evidence at sentencing" that Gray was under mental or emotional strain when he murdered his wife.[11] Majority Op. at 25. In fact, the trial court found that sufficient evidence had been presented to justify submission of the mental health mitigating factors to the jury. A number of *lay witnesses*, at trial and at sentencing, testified that Gray was under significant stress and acting out of character at the time of the murder.[12] This testimony supported defense counsel's sentencing theory, in particular its argument that the jury should find the mental or emotional disturbance mitigating factor because Gray "suffered from stress or a stressful situation as the result of the break up of the family

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[11] The majority's statement is most directly contradicted by a comment from defense counsel Worthington's closing argument at sentencing: "You heard Charles Buchanan, a life-long friend talk about Mr. Gray's mother [whose hospitalization, Buchanan had explained, caused Gray considerable distress], and this is the mitigating factor, the felony was committed while the defendant was under the influence of mental or emotional distress." J.A. 1430.

[12] *See, e.g.*, J.A. 1289 (Charles Buchanan, a friend of the Grays, testifying at sentencing that the couple was very close throughout their marriage, until early 1992, and that at that point the dissolution of the marriage was "tearing [Gray] up"); J.A. 802 (Debbie Ryals, another friend of the Grays, indicating that in the period leading up to the murder Gray "didn't appear to be in his right mind' and spoke violently about his conflicts with his wife); J.A. 822 (Don Hollowell, another friend of the Grays, testifying that after the couple's separation Gray was "very disturbed' and "didn't have a grasp of what was going on").

marital unit and as a result of stress caused by the hospitalization of the defendant's mother." J.A. 1455.

The majority leaves no doubt that it would have taken a different approach at sentencing. The majority's preferred strategy, concocted with the benefit of hindsight, grows out of its conviction that "mental health mitigating factors . . . were Gray's best hope of convincing the jury that he did not deserve the death penalty." Majority Op. at 21. The majority opines that "[t]he missing *expert* evidence on Gray's impaired mental condition would have provided the essential support for these factors." *Id.* (emphasis added). In so deciding, the majority faults Gray's counsel because, the majority suggests, "There is no indication that [defense counsel] understood that *expert* mental health evidence could be critical to the jury's decision on sentencing." *Id.* at 15 (emphasis added).

Regrettably, this speculation calls defense counsel to account for a failure to pursue the majority's preferred strategy, based on the majority's forecast of what evidence "would have" been provided and what that evidence "could" have done in the jury's minds. Contrary to the majority's assertion, however, there is no objective evidence that its favored strategy was the "best," or even that its strategy offered greater promise than defense counsel's chosen course. Therefore, the only way the majority here could rightly condemn defense counsel's actions would be if a *per se* rule required the presentment of expert mental health mitigation evidence. But that is not the law. *Meyer*, 506 F.3d at 372 ("No *per se* rule requires the

presentment of [mental health mitigation] evidence at trial.").

The majority's opinion, then, is precisely the type of overreaching condemned by *Strickland* and its progeny. Today, two jurists, with the benefit of hindsight, discard the high degree of deference owed to defense counsel's strategic choices, and replace it with an attempt to mandate that sentencing strategies in death penalty cases always include presentation of expert mental health testimony. The opinion is grossly out of step with the flexible approach required under Supreme Court and Fourth Circuit precedent. *See Meyer*, 506 F.3d at 371-72; *Strickland*, 466 U.S. at 688-89. Under AEDPA's highly deferential standard of review, there is no basis for any conclusion other than that counsel's approach to the investigation of Gray's mental health was marked by reasonable professional judgments, that counsel's performance was not deficient, and that the MAR court did not unreasonably apply Supreme Court precedent in so finding.

B.

The majority's opinion regarding prejudice is even more problematic. William Robert Gray murdered his wife in the driveway of his home after she begged a passerby for assistance. In the face of overwhelming evidence of guilt, which it wisely does not address, the majority is faced with the difficult task of showing that psychological testimony might have made a difference. By any objectively reasonable standard, it would not.

Under North Carolina law, a habeas petitioner "must demonstrate a reasonable probability that at least one juror would have found that his new mitigating evidence, combined with the existing mitigating evidence, outweighed the aggravating circumstances." *Buckner v. Polk*, 453 F.3d 195, 203 (4th Cir. 2006). This court applies a heavy measure of deference to the MAR court's conclusion regarding prejudice:

> Even if on de novo review we might strike a different balance concerning the relative weight of the aggravating and mitigating evidence, we may not disturb the MAR court's conclusion that [the petitioner] did not demonstrate prejudice unless we find that conclusion to be unreasonable in light of clearly established Supreme Court precedent or in light of the evidence before the MAR court. *See* § 2254(d)(1)-(2). When determining whether [the petitioner] has satisfied one of these two standards, we must presume the MAR court's factual findings to be correct unless [the petitioner] provides clear and convincing evidence to the contrary. *See* § 2254(e)(1).

Id.

After an exhaustive hearing, the MAR court rejected Gray's ineffective assistance claims in a 45-page order. The court "f[ou]nd that the record contains persuasive testimony from State and defense witnesses that defendant was calm, in control, and conducted

himself normally as a person in 'their right mind' throughout the period of the contentious divorce proceedings and up to the murder itself." J.A. 1563. The witness testimony cited by the court "offered first-hand observation and experience with defendant in the days and months preceding the murder." J.A. 1564. In light of this evidence, the court rejected Gray's contention that there was a reasonable probability that the presentation of other mental health evidence would have changed the outcome of his trial. As a result, the court found that Gray failed to satisfy *Strickland*'s prejudice prong.

The majority first suggests that the state court applied the incorrect standard. In its order, the state court wrote, "Even with the proffered medical testimony this [c]ourt finds it to be a leap of speculation that the jury would necessarily have found the existence of the statutory and nonstatutory mitigating circumstances." J.A. 1566. The majority reads this statement out of context to show that the MAR court required certainty when all that was required under *Strickland* was a reasonable probability of a different outcome. However, the next sentence in the MAR court opinion suggests that the MAR court plainly understood the proper standard: "It is a further leap of speculation that there is a reasonable probability that the result of defendant's trial would have been any different." *Id.* Despite its inartful word choice, the MAR court applied the correct standard.

Next, the majority questions the MAR court's failure to engage in an explicit reweighing of all

available mitigation evidence, including expert mental health evidence, against the case in aggravation. In so doing, the majority attempts to obscure the obvious: that other than the proffered testimony of Dr. Bellard, which the MAR court fully considered but ultimately found unpersuasive, *there was no additional expert mental health evidence* to add to the mitigating side of the balance. Under these circumstances, an explicit discussion of the reweighing process would have been farcical.[13]

The majority's substitution of its factual findings for those of the MAR court is legally impermissible, *see Buckner*, 453 F.3d at 203, and makes a mockery of the principles of federalism underlying habeas review. Moreover, the majority's doe-eyed view of what Gray might have presented and its resultant conclusion notwithstanding, a dispassionate analysis of the entire case in mitigation suggests that it would have been strengthened little, if at all, by the proffered mental health evidence. Indeed, much of the omitted evidence

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[13] The majority also ignores the significance of the Supreme Court's recent decision in *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007). In *Schriro*, the Supreme Court emphasized that reviewing courts must assess reasonableness from the perspective of the state postconviction court *at the time it made its decision*. *Schriro*, 127 S. Ct. at 1942. When the MAR court issued its decision in this case, it was not objectively unreasonable for a state postconviction court to conclude that a defendant could not establish prejudice after refusing to allow his counsel to obtain mental health evidence in support of the case in mitigation. *See id.* The majority's analogy to *Rompilla*, Majority Op. at 15, in support of the contrary conclusion is misguided; *Rompilla* was unavailable to the MAR court at the time it made its decision.

would likely have harmed Gray's case as much as, or more than, it would have helped.

Numerous lay witnesses, including Gray himself, testified at trial and at sentencing in support of defense counsel's theory that Gray had been a loving father, son, and spouse, who became increasingly troubled under the strain of the break-up of his marriage and the fading health of his mother. Additional lay witness testimony to these issues would have been duplicative, and therefore must be discounted under our precedent. *See Buckner*, 453 F.3d at 207. *See also Bowie v. Branker*, 512 F.3d 112, 121 (4th Cir. 2008). Furthermore, in evaluating the possible prejudice resulting from counsel's failure to procure additional testimony on these topics, one must recognize that the existing testimony regarding Gray's erratic and overly emotional behavior during the couple's separation accompanied observations that he was in full control of his mental faculties at the time of the murder. *See, e.g.*, J.A. 822-24, 831. Therefore, additional lay testimony in this vein likely would also have been double-edged. *See Moody v. Polk*, 408 F.3d 141, 152 (4th Cir. 2005).

The majority fails to recognize the centrality of this abundant *lay* witness testimony to defense counsel's mitigation theory. Counsel chose to focus on Gray's mental and emotional stress and chose *not* to attempt to demonstrate the existence of a diagnosable mental or emotional impairment. To support its chosen theory, counsel was able to rely on numerous firsthand observations of Gray in the time period before the murder. The available evidence from

medical professionals, suggesting that Gray did not suffer from a diagnosable mental illness, only bolstered counsel's choice to focus on lay witness testimony. *See* J.A. 789 (Dr. Barker, commenting that "[he] felt [Gray] was in control of his mental faculties. He just sounded to me very obsessively compulsive about this situation."); J.A. 252 (Dr. Lara's evaluation, summarizing, "[I]t is my opinion that this patient's condition at the time in question did not impair his basic understanding of the nature and quality of his actions nor his ability to recognize right from wrong," but that "[t]he magnitude of ongoing stressors may have contributed to regression in behavior and reductions in impulse control and control of emotions.").

Nevertheless, the majority holds that defense counsel's failure to procure *expert* witness testimony prejudiced Gray because the supposedly "missing" expert testimony—in particular, the testimony of Dr. Bellard—would have demonstrated that Gray suffered from Paranoid Personality Disorder at the time of the murder.[14]

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[14] The majority's star witness, Dr. Bellard, acknowledged that paranoid personality disorder requires evaluation of an individual's long-term patterns and functioning, and manifests itself by late adolescence or early adulthood. J.A. 1753. Such a diagnosis would thus cut directly against defense counsel's mitigation theory that Gray was a normal, healthily functioning adult and a loving father, son, and husband, up until the dissolution of his marriage and his mother's hospitalization. *See supra* Part III.A.

The majority fails to acknowledge several glaring substantive weaknesses of its assertion that expert evidence would have aided Gray. First, the expert evidence ostensibly missing from the case in mitigation would likely have been double-edged. For example, had defense counsel called Dr. Lara, the forensic psychiatrist from Dorothea Dix, to provide expert testimony in mitigation, he could have testified to the initial diagnostic impression of Gray as presenting "an adjustment reaction with mixed disturbance of emotions and conduct in relation to current ongoing stress." J.A. 246. However, he would have also had to acknowledge that observing Gray shortly after the murder and his subsequent arrest presented "an extreme situation that may [have] exaggerate[d] personality traits to a level that may [have] appeare[d] pathological." J.A. 251. Of course, he would also have had to admit that the hospital found "no evident psychosis nor any impairment in this patient's ability to understand his situation and surroundings," and "no findings to suggest evidence of ongoing medical illness." *Id.* In addition, he would have been constrained by his own opinion, included in the discharge summary, "that [Gray's] condition at the time in question did not impair his basic understanding of the nature and quality of his actions nor his ability to recognize right from wrong." J.A. 252. In the best-case scenario for Gray, testimony by Dr. Lara would have been internally inconsistent and would have also severely undercut the proffered testimony of Dr. Bellard. Our precedent demands that we discount such equivocal mental health evidence. *See Bowie*, 512 F.3d at 121 (holding that equivocal mental health evidence failed to demonstrate "a

reasonable probability that the jury would not have recommended death"); *Moody*, 408 F.3d at 152.

Second, Gray failed to present any evidence to contradict the MAR court's reasoned decision to discount the proffered expert testimony of Dr. Bellard.[15] Even were the MAR court wrong to

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[15] The majority suggests that the MAR court's reasons for discounting Dr. Bellard's testimony were "objectively unreasonable." Majority Op. at 22. The first factor in the MAR court's decision was the fact that Dr. Bellard's opinion, based on a total of four hours spent with Gray, took place *six years* after the murder. I fail to see how the brevity of the evaluation and the significant time gap between the murder and the evaluation were "objectively unreasonable" factors for the MAR court to have considered. The MAR court also found it significant that "Dr. Bellard had not reviewed the trial testimony which set forth defendant's actions and conduct in the days and months leading up to the murder . . . as well as the friends relatives, and associates of defendant." J.A. 1562. Instead of recognizing the reasonableness of discounting Dr. Bellard's testimony on this basis, the majority instead highlights the sliver of the trial record that Dr. Bellard *did* review: the testimony of *one* witness, Gray's son's counselor; the testimony of Gray himself; and two affidavits. That Dr. Bellard performed this limited review does nothing to lessen the import of the evidence Dr. Bellard *failed* to review and the reasonableness of the MAR court's recognition of the resulting limits of Dr. Bellard's testimony.

Finally, the majority grasps at straws in noting that "[t]he DSM-IV diagnostic criteria . . . nowhere states, as the MAR court asserted, that interviewing other individuals 'is important to making the diagnosis." Majority Op. at 22 (quoting J.A. 1562). The MAR court wrote, and Dr. Bellard agreed, that "[t]he testimony or observations of individuals with knowledge of defendant's behavior and personality during defendant's late adolescence and early adulthood is important to making the diagnosis arrived at by Dr. Bellard." J.A. 1562; *see* J.A. 1753. The

discount this testimony, the evidence the majority finds that the jury "would have heard" from Dr. Bellard, Majority Op. at 21, pales in comparison to the evidence presented in cases in which prejudice has been found. *See Williams*, 529 U.S. at 395 & n.19 (finding prejudice from counsel's failure to present evidence of the defendant's "nightmarish childhood," which included criminal neglect and physical abuse of the defendant by his parents); *Wiggins*, 539 U.S. at 536 (finding prejudice from counsel's failure to alert the jury to the defendant's borderline mental retardation and severe childhood physical and sexual abuse).

Neither Gray nor the majority has shown the state MAR court's conclusions respecting potential prejudice on the available body of evidence to be unreasonable in light of clearly established Supreme Court precedent, *see* § 2254(d)(1)-(2), or rebuttable by clear and convincing contrary evidence, *see* § 2254(e)(1).

MAR court then commented, "This is noted by the manual Dr. Bellard himself utilizes, the . . . DSM-IV." *Id.* at 1562-63. The majority pounces on this line, saying that "the MAR court drastically mischaracterized the diagnostic requirements of the DSM-IV." Majority Op. at 22. However, assuming the DSM-IV does not make the MAR court's point directly, the MAR court's statement was a fair inference from Dr. Bellard's testimony and not remotely suggestive of any objective unreasonableness in the MAR court's opinion. *See* J.A. 1753 (testimony of Dr. Bellard, admitting that the DSM-IV requires an evaluation of an individual's long-term patterns and functioning; that paranoid personality disorder, the diagnosis given Gray by Dr. Bellard using the DSM-IV, usually manifests by late adolescence or early adulthood; and that it therefore would have been useful to talk to people who knew Gray during this time-period in his life).

Instead, finding no reasonable basis for an assault on the state MAR court's opinion under AEDPA, the majority departs from the statutorily prescribed boundaries that should cabin its review. So situated, and free to maneuver without the nettlesome requirements of statute, precedent, and standards of review, the majority casts aside the MAR court's opinion and conducts its own analysis in the first instance, concluding that Gray's mitigation case, with Dr. Bellard's opinion added, would have been "quite powerful." Majority Op. at 23.[16] In so concluding, it ignores the heavy measure of deference usually afforded defense counsel's strategic decisions, instead deciding on its own what strategy presented "Gray's best hope of convincing the jury that he did not deserve the death penalty." Majority Op. at 21. With its preferred result in sight, the majority "weighs" a "powerful" mitigation case of its own making against the state's evidence in support of the death penalty and concludes, unsurprisingly, that there is a reasonable probability that the jury would have returned with a different sentence.

Contrary to the majority's analysis, given the deferential AEDPA standard of review, the substantive weakness of the new evidence, and the

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[16] The majority speculates that Gray's counsel "could have introduced expert testimony *such as* that of Dr. Bellard . . . ," and then further speculates about what a jury "would have heard from such an expert." Majority Op. at 21 (emphasis added). The majority cannot now manufacture a hypothetical expert super-witness who would have given Gray helpful testimony while somehow avoiding the deficiencies noted by the MAR court in its decision, after full consideration, to discount Dr. Bellard's opinion.

failure of Gray and the majority to rebut the MAR court's adverse treatment of Dr. Bellard's opinion, our precedent dictates that the MAR court's findings on prejudice should have been allowed to stand. *See Buckner*, 453 F.3d at 207.

IV.

For the foregoing reasons, I dissent from the portion of the majority opinion reversing the judgment of the district court. I concur in the majority opinion to the extent it affirms the district court's judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION

No. 5:02-HC-335-BO

[Filed: March 28, 2006]

WILLIAM ROBERT GRAY, JR., Petitioner,	)	
v.	)	ORDER
MARVIN POLK, Warden Central Prison, Raleigh, North Carolina, Respondent.	)	

This matter is before the court on the petition for writ of habeas corpus and the amendment to petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, on behalf of William Robert Gray, Jr. ("Gray" or "Petitioner"). Respondent has answered, and the parties have filed cross-motions for summary judgment. The matters are ripe for ruling.

STATEMENT OF THE CASE

Gray was tried and convicted of first-degree murder at the November 1, 1993, criminal session of the Superior Court of Lenoir County. The following facts are summarized from the opinion of the Supreme

Court of North Carolina. *See State v. Gray*, 347 N.C. 143, 491 S.E.2d 538 (1997).

A. Facts

The victim, Roslyn Sage Gray, was Petitioner's wife. At the time of her murder, she and Petitioner were separated and going through a contentious divorce. On the evening of November 25, 1992, she went to Petitioner's house to drop off their children with whom she had been visiting. Petitioner went outside and got into her Jeep which was in the street.

At trial, a witness who had been jogging, testified he heard screaming and yelling coming from a Jeep in front of Petitioner's house. A woman got out of the Jeep and ran up the driveway. The witness then saw a man run from the Jeep and tackle the woman. Petitioner got on top of the victim and the two struggled. The witness stopped and asked what was going on. Petitioner told him to leave, but the victim asked him not to leave telling him "Mister, please don't leave. If you leave, he'll kill me." The jogger then heard a shot and Petitioner ran behind the house. The forensic testimony showed that the victim died from a gunshot wound to the head. The victim also suffered injuries from a stun-gun and was beaten with the butt of a pistol.

When Petitioner was questioned by police he claimed he knew nothing about the shooting and said he was in the bathtub at the time. He maintained this position, including with his attorneys, until about nine days before the start of trial. At trial he testified the

shooting was an accident. He claimed that he and the victim were arguing in the driveway and she started to use the stun-gun on him. He said they were struggling, but he was trying to subdue her so they could talk. He took the stun gun from her and threw it in the bushes.[1] He heard a click and turned to see her holding a gun. As he pushed the gun away it went off and Roslyn Gray was shot.

B. Procedural History

On May 10, 1993, Gray was indicted on one count of first-degree murder. Petitioner was represented by retained counsel, Bob D. Worthington and Dal F. Wooten. After a jury trial, he was found guilty and the jury recommended the death penalty. The jury found as aggravating circumstances: 1) the murder was especially heinous, atrocious, and cruel; 2) the murder was committed to disrupt or hinder a lawful government function (divorce action and related discovery); and 3) the murder was committed against the victim because of her exercise of duty as a witness (swearing out criminal warrants for violence against wife and waiting to testify). The trial court subsequently sentenced Petitioner to death.

On January 5, 1995, David G. Belser was appointed to represent Petitioner on direct appeal. An appeal was filed and the Supreme Court of North Carolina subsequently affirmed his conviction and sentence. *State v. Gray*, 347 N.C. 143, 491 S.E.2d 538

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[1] The police found the stun gun in the bushes next to the driveway

(1997). The United States Supreme Court denied certiorari. *Gray v. North Carolina*, 523 U.S. 1031 (1998).

Stanley F. Hammer and John D. Bryson were appointed to represent Petitioner in state post-conviction proceedings. On March 5, 1999, Petitioner filed a motion for appropriate relief ("MAR") in the Superior Court of Lenoir County. On July 21-22, 1999, the MAR court held an evidentiary hearing on the MAR. At the end of the hearing, the judge ruled that the MAR was denied. Petitioner filed a motion for reconsideration which was denied. On December 13, 2000, the MAR judge entered a written order in support of his ruling from the bench denying the MAR.

Petitioner filed a petition for writ of certiorari with the Supreme Court of North Carolina. Petitioner subsequently filed a motion to stay the proceedings in the Supreme Court of North Carolina pending the United States Supreme Court's ruling in *Mickens v. Taylor, cert. granted*, 532 U.S. 970 (2001). The Supreme Court of North Carolina granted the stay on August 16, 2001. *State v. Gray*, 354 N.C. 71, 553 S.E.2d 205 (2001). While the matter was stayed, Petitioner filed a *pro se* motion to remove counsel and appoint new counsel, and the Supreme Court of North Carolina remanded for a hearing on the motion. *State v. Gray*, 355 N.C. 218, 559 S.E.2d 188 (2001). On remand, a hearing was held in the Superior Court of Lenoir County. At the conclusion of the hearing, the motion to remove counsel and appoint new counsel was denied. After the United States Supreme Court ruled

in *Mickens*, the Supreme Court of North Carolina lifted the stay on May 9, 2002. On the same day, the court entered an order denying the petition for writ of certiorari. *State v. Gray*, 355 N.C. 496, 564 S.E.2d 48 (2002). A *pro se* motion to reconsider the petition for writ of certiorari and motion to appoint counsel were subsequently denied. *State v. Gray*, 355 N.C. 753, 565 S.E.2d 677 (2002).

On May 20, 2002, Gray filed a petition for writ of habeas corpus with this court. The petition was filed on May 20, 2002, by attorneys Stanley Hammer and John Bryson who had represented Petitioner in State post-conviction proceedings. The petition was filed simultaneously with Petitioner's motion for appointment of counsel in which Mr. Hammer, on behalf of Petitioner, asked for Mr. Hammer and Mr. Bryson to be appointed, or alternatively, for the court to appoint new counsel. The motion indicated that Petitioner had filed a *pro se* motion in state court to have Mr. Hammer and Mr. Bryson removed and new counsel appointed.

On May 23, 2002, Petitioner filed a document verifying the petition. In the verification of the petition, he noted that he disagreed with counsel's argument regarding his mental and emotional condition. He further indicated his disagreement was set forth in detail in an attached letter. In the handwritten letter dated May 22, 2002, Petitioner explained that the only reason he verified the petition was to ensure he was not denied a federal appeal. He said he totally disagreed with Mr. Hammer's theory

and that Mr. Hammer completely ignored Petitioner's wishes. Lastly, he asked for new counsel.

The court held a hearing, at which Petitioner was present, to address the motion for new counsel. On August 16, 2002, Edwin West and Heather Wells were appointed as new counsel. After reviewing the matter, Mr. West and Ms. Wells indicated they wanted to amend or supplement the petition, and were given until May 20, 2003, to do so. Subsequently, in an *ex parte* status report filed with the court on May 20, 2003, counsel indicated that after researching and reviewing the matter they had decided not to add claims to the petition.

In an order filed on September 12, 2003, the court directed Respondent to file a response to the petition. On October 17, 2003, Petitioner filed a *pro se* motion for appointment of counsel. In the motion, Petitioner argued that West and Wells filed an "erroneous, inaccurate, incomplete, and fraudulent writ of habeas corpus" without his consent and without informing him of their intent. He argued that they said they would modify or expand the writ submitted by Mr. Hammer, but did not do so. Petitioner asserted there was new evidence of innocence which should have been raised, but counsel failed to do so. He asked the court to defer ruling on his petition until new counsel could be appointed. He also asked to be allowed to submit and argue new evidence of innocence and additional issues if new lawyers were denied.

On October 15, 2003, Edwin West and Heather Wells filed an *ex parte* motion to withdraw as counsel.

On October 28, 2003, Respondent filed an answer to the petition and a motion for summary judgment. On December 2, 2003, an *in camera* hearing was held before the court on the motion to withdraw as counsel. After a hearing, the court granted the motion and ordered a psychological evaluation of Petitioner. Subsequent to receiving the results of the evaluation, on April 6, 2004, Paul Green and Matt Stiegler were appointed as new counsel. On July 12, 2004, they filed a motion to amend the petition. In an order filed on September 30, 2004, the court granted the motion to amend the petition and directed the Respondent to respond.

On August 12, 2004, Petitioner filed a response to respondent's motion for summary judgment and a cross-motion for summary judgment. On November 1, 2004, Respondent filed an answer to the amendment to the petition and a renewed motion for summary judgment. On November 12, 2004, Petitioner filed a renewed cross-motion for summary judgment and a response to Respondent's motion for summary judgment on the amendment to the petition. The matters are ripe for ruling.

DISCUSSION

A. Standard of Review

Summary judgment is appropriate when there exists no genuine issue of material fact and the moving party is entitled to judgement as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Review of Gray's claims is

governed by 28 U.S.C. § 2254(d), as modified by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104, 132, 110 Stat. 1214 (1996). Section 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The phrase "'clearly established Federal law, as determined by the Supreme Court of the United States . . . refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decisions." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). A state court decision is

"contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Id.* at 413. A state court decision "involve[s] an unreasonable application of" clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411.

Only after a petitioner establishes that the state court's adjudication of his claims was "contrary to" or an "unreasonable application of" clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence may a federal court proceed to review a state court judgment independently to determine whether habeas relief is warranted. *Rose v. Lee*, 252 F.3d 676 (4th Cir. 2001). If the state court did not articulate the rationale underlying its adjudication, a federal habeas court must examine the record and the clearly established Supreme Court precedent to determine whether the state court's adjudication was contrary to or involved an unreasonable application of clearly established federal law. *Bell v. Jarvis*, 236 F.3d 149, 158 (4th Cir. 2000). If, however, the state court failed

to adjudicate a properly presented claim, the federal court must review questions of law and mixed questions of law and fact *de novo*. *Fisher v. Lee*, 215 F.3d 438, 445 (4th Cir. 2000). Finally, the factual findings of the state court are presumed to be correct. 28 U.S.C. § 2254(e)(1). The petitioner bears the burden of rebutting this presumption by clear and convincing evidence. *Id.*

B. Gray's Claims

Petitioner Gray argues that his conviction and sentence are in violation of his constitutional rights in the following respects:

> Claim I — Ineffective assistance of counsel because counsel failed to investigate or present mitigating evidence related to Petitioner's emotional and mental condition at the time of the offense;
>
> Claim II — Ineffective assistance of counsel because his attorney was a material witness who should have withdrawn and testified on Petitioner's behalf;
>
> Claim III — Counsel suffered from a conflict of interest;
>
> Claim IV — Ineffective assistance of appellate counsel because counsel failed to raise the issue of ineffective assistance of trial counsel;

Claim V — The trial court unconstitutionally denied Gray's motion for a change of venue;

Claim VI — The jury instruction on the "heinous, atrocious, or cruel" aggravating factor was vague and overbroad and unsupported by sufficient evidence;

Claim VII — The aggravating circumstances were duplicative and unsupported by sufficient evidence in violation of the constitution;

Claim VIII — Petitioner's constitutional rights were violated by trial counsel's failure to adequately investigate and present expert testimony from a forensic pathologist.

C. Discussion of Claims in the Original Petition

1. Claim I — Ineffective assistance of counsel because counsel failed to investigate or present mitigating evidence

In Claim I, Petitioner argues he received ineffective assistance of counsel because his attorneys failed to investigate or present mitigating evidence at trial related to his emotional or mental condition at the time of the murder. He argues that counsel were aware of evidence that suggested mental distress or psychological problems, but they failed to retain a mental health expert to investigate his condition or to testify and assist at trial. This issue was first raised by Petitioner in his MAR. After an evidentiary hearing, the claim was denied on the merits.

To establish ineffective assistance of counsel, a petitioner must show that counsel's representation "fell below an objective standard of reasonableness" and that there is "a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." *Strickland v. Washington*, 466, U.S. 668, 694 (1984). In the context of a capital sentencing proceeding, the question with respect to prejudice is "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695. The court must judge the reasonableness of counsel's performance based upon the specific facts of the case, viewed as of the time of counsel's conduct. *Id.* at 690. "A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91 (1955)). A petitioner with retained, as opposed to appointed, counsel is not afforded any less protection under the Sixth Amendment. *Mickens v. Taylor*, 535 U.S. 162, 169 n.2 (1980).

At trial, two of the statutory mitigating circumstances submitted were: 1) defendant acted under the influence of mental or emotional disturbance, and 2) defendant's ability to conform his conduct to the requirements of law was impaired. *See* N.C. Gen. Stat. § 15A-2000(f)((2) & (6). No juror found either of these statutory mitigating circumstances.

Petitioner argues that proof of these circumstances is usually not established without the testimony of a mental health expert. Petitioner also argues that counsel should have been aware that his ability to form specific intent was impaired at the time Roslyn Gray was shot, that he was acting under mental distress, and was unable to conform his conduct to the law. Therefore, Petitioner contends it was objectively unreasonable for counsel not to secure mental health experts. He asserts the result of the trial would have been different if counsel had done so. In arguing this claim in his cross-motion for summary judgment, Petitioner cites to *Wiggins v. Smith*, 539 U.S. 510, 521-23 (2003), for the premise that the reasonableness of counsel's tactical decision depends on the reasonableness of the investigation. In *Wiggins*, the Supreme Court found that petitioner had received ineffective assistance of counsel because his trial attorneys failed to conduct a reasonable investigation into mitigating evidence that could have been presented at sentencing. Considering the specific facts of the case, the Court found that "counsel chose to abandon their investigation at an unreasonable juncture." *Id.* at 527-28.

In denying the MAR, the court found there was persuasive testimony that "defendant was calm, in control, and conducted himself normally as a person in 'their right mind' throughout the period of the contentious divorce proceedings and up to the murder itself." MAR Order at 23. The MAR court noted that Petitioner's trial attorney, Bob Worthington, testified at the hearing he would not have allowed Petitioner to be interviewed by the police on the night of the murder

if he had concerns about Petitioner's mental health or competency. MAR Order at 24. The MAR court noted that Petitioner initially insisted to his attorney that he had no involvement in the crime and therefore, the defense was proceeding on that basis. Nonetheless, Worthington had suggested an in independent psychiatric examination and asked Petitioner to authorize funds for expert assistance so that the psychiatric expert could be on standby if necessary. The MAR court noted that Petitioner's trial counsel were retained, not appointed, and although Petitioner authorized funds for other experts, he refused to authorize funds for a psychiatric examination.[2] The MAR court found that "Attorney Worthington was not obligated to expend his own funds or resources, or request funds from the court when defendant was not indigent, on any independent psychiatric examinations in light of the defendant's express resistance to any such action." MAR Order at 25. The MAR court held that Petitioner failed to satisfy the performance or prejudice prong of *Strickland*.

Petitioner is unable to show that the MAR court's ruling is an unreasonable determination of the facts or an unreasonable application of clearly established federal law. Petitioner was evaluated at Dorothea Dix approximately one week after the murder. At the hearing on the MAR, Worthington explained that although he did not have any particular concerns about Gray's mental health, given the seriousness of

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[2] Petitioner authorized funds for a Ph.D. in jury selection and a surveyor to search for the murder weapon. MAR Tr. at 79-80.

the offense he felt it was appropriate to have Petitioner evaluated and he had him sent to Dorothea Dix. MAR Tr. at 116- 17.

In the resulting report, Dr. Patricio Lara noted the evaluation was obtained because Petitioner's attorney indicated Petitioner was in a "state of shock and unable to understand the gravity of the situation." Exhibit 6 to Petition at 4. The report finds no evidence of psychosis or impairment in his ability to understand and "no findings to suggest evidence of ongoing mental illness." Exh. 6 to Petitioner at 7. The report also indicates that "[a]vailable information describing this patient's condition around the time of the incident in question indicate that he was under ongoing stress related to his family and marital situation . . . . Based on available information, it is my opinion that this patient's condition at the time in question did not impair his basic understanding of the nature and quality of his actions nor his ability to recognize right from wrong. The magnitude of ongoing stressors may have contributed to regression in behavior and reductions in impulse control and control of emotions. Exh. 6 to Petition at 8.[3]

Worthington also testified at the MAR hearing that in preparing for trial he wanted to get an independent psychiatrist to be on standby, but Petitioner would not allow him to do so. MAR Tr. at

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[3] Petitioner relies heavily upon this last sentence to show that a mental health expert was necessary.

78-79.[4] When asked about what evidence was submitted in support of the mitigating factors, Mr. Worthington noted he approached Petitioner about obtaining an expert but his request was refused. In fact, he testified at the hearing that "[h]is words were not to spend another f'ing penny on this trial, that he didn't need a psychiatrist, that he had already been to Dorothea Dix. There was nothing wrong with him. He didn't need any more psychiatric evaluation." MAR Tr. at 80. He explained that Petitioner had funds, but would not authorize them for a mental health expert. *Id.* He also asked Petitioner's good friend, Don Hollowell, to talk with Petitioner about retaining a mental health expert, but Petitioner gave Don Hollowell the same answer. MAR Tr. at 87. Faced with this restriction, the defense instead called lay witnesses, such as Don Hollowell, in an attempt to show Petitioner was experiencing mental distress and acting out of character due to the divorce and issues surrounding custody of his children and the break-up of his family.

In light of this evidence, Petitioner is unable to show that counsel acted objectively unreasonable in violation of *Strickland* or that he was prejudiced by counsel's failure to obtain a mental health expert. Nor can Petitioner demonstrate he is entitled to relief on the basis of *Wiggins*. The circumstances in Petitioner's case are distinguishable from the circumstances in

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[4] Until days before trial, Petitioner insisted he was not involved in the victim's death and defense counsel was proceeding on that basis. At trial, Petitioner testified that the gun fired accidentally.

Wiggins. Petitioner's counsel did act to investigate and develop mental health evidence by having Petitioner sent to Dorothea Dix for an evaluation. Subsequently, although no appreciable mental health evidence was brought forth from the evaluation, counsel approached his client about retaining an independent expert, but his request was vehemently denied.

Petitioner disagrees with the MAR court's factual findings, but fails to rebut them by clear and convincing evidence. Further, Petitioner is unable to show the MAR court's ruling, based on these factual findings, is an unreasonable application of clearly established federal law. Respondent's motion for summary judgment on Claim I is granted.

2. Claim II — Ineffective assistance of counsel because counsel was a material witness

and

Claim III — Petitioner was denied conflict free counsel

In Claim II, Petitioner argues he was denied effective assistance of counsel and a fair trial because Bob Worthington did not withdraw as trial counsel. He contends that Worthington was a material witness who could have testified about Petitioner's mental and emotional condition on the night of the murder. Petitioner also contends that Worthington could have testified that Petitioner intended to comply with court ordered discovery in the domestic case with his wife

which undermined the aggravating factors relied upon by the State. In Claim III, Petitioner raises the related argument that he was deprived of conflict free counsel by Bob Worthington's failure to withdraw as trial counsel. He argues that Worthington, knowing he was a potential witness as to Petitioner's mental condition and his intent to comply with discovery, did not move to withdraw as counsel or even inform Petitioner of the conflict of interest.[5]

Petitioner first raised these claims in his MAR and the MAR court denied the claims on the merits. MAR Order at 7, 10, 19.

In denying his claim of ineffective assistance of counsel on the basis that he was a possible witness to Petitioner's mental state at the time of the offense, the MAR court found Worthington had no opportunity to see or interact with Petitioner on the night of the murder until Petitioner was at the police station. MAR Order at 6. The MAR court noted that Worthington testified that while speaking to Petitioner at the police station he found him to be "rational, coherent, and fully aware of his situation and attendant circumstances." *Id.* The MAR court also noted that Worthington clarified that when he described Petitioner as dazed on the night of the murder he meant "haggard, worn out, tired, and

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[5] In his MAR, Petitioner also argued that counsel suffered from a conflict of interest because of he was a potential witness on the reaction of defendant's children and witness as to the fact Petitioner was improperly kept away from counsel the night of the murder. He does not raise these arguments in the petition.

frustrated." MAR Order at 6. Based on these factual findings, the MAR court found that Petitioner could not satisfy either prong of *Strickland* on his claim that he received ineffective assistance of counsel because his attorney should have withdrawn because he could have been a witness as to Petitioner's mental state. *Id.* at 7.

With respect to the claim of ineffective assistance of counsel on the basis he was a possible witness to Petitioner's intention to comply with the discovery in the divorce case, the MAR court found that Worthington had been retained by Petitioner as counsel in the divorce proceedings less than two weeks before the murder of Roslyn Gray.[6] MAR Order at 8. The court noted that Petitioner testified at trial that he intended to prepare the responses after the Thanksgiving holiday. The MAR court found it "relevant that the murder of Roslyn Gray occurred before the Thanksgiving holiday." MAR Order at 8. The MAR order notes that Worthington testified at the MAR hearing that he had not done any work on Petitioner's divorce case before the murder. MAR Order at 8. Petitioner's attorney expert testified at the hearing that Worthington could have testified about Petitioner's divorce case and that Petitioner planned to comply with the discovery order. The MAR court found that the evidence from the hearing did not support this contention. MAR Order at 8. The MAR court found that Worthington's testimony established

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[6] Bob Worthington was the third domestic attorney hired by Petitioner. He first hired and parted ways with attorney Daniel Perry and then attorney Bill Gerrans. MAR Tr. at 47-48.

he had not done work on Petitioner's divorce case and did not have any personal knowledge of facts of consequence about the divorce case. MAR Order at 8-9. The MAR court also found that Worthington had "no substantive involvement in preparing any response to the discovery order prior to the murder . . . Defendant testified at his trial that he intended to comply with the discovery order. Attorney Worthington can add little more than the fact that defendant expressed an 'intent' to comply." MAR Order at 9. The MAR court held that Worthington's failure to withdraw so as to be in a position to testify about Petitioner's intention to complete discovery was not objectively unreasonable. *Id.* The MAR court also held that Petitioner could not show prejudice under *Strickland*. *Id.*

The MAR court similarly found that Petitioner's claim that he was deprived of his right to conflict free counsel because Attorney Worthington was a potential witness did not entitle him to relief. MAR Order at 13. In reaching this decision, the MAR court noted that Worthington's failure to testify for the defense did not have merit for the same reasons it had discussed in addressing his ineffective assistance of counsel claim. MAR Order at 19. The MAR court found that Worthington "presented an aggressive, zealous, and exhaustive defense that was free of any conflict of interest that hindered or adversely affected attorney Worthington's efforts." MAR Order at 19. "Attorney Worthington's failure to withdraw as trial counsel and testify as a witness for defendant did not have any affect on the adequacy of representation provided to

defendant for the reasons stated in the Court's analysis of Claim I." MAR Order at 19.

Petitioner is unable to show that the MAR court's ruling is unreasonable with respect to his claims of ineffective assistance of counsel. This court must presume the factual findings of the MAR court are correct. *See* 28 U.S.C. § 2254(e)(l). The MAR court found that Worthington was not in a position to testify about Petitioner's domestic case because although he had been retained, he had not yet done any work on the case. With respect to Petitioner's mental state on the night of the murder, the MAR court found that Worthington did not have any contact with Petitioner until he was at the police station and Worthington's impression was that Petitioner, although tired, was rational and coherent. To establish prejudice due to ineffective assistance of counsel, Petitioner must show a reasonable probability that, but for any alleged errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. Petitioner does not rebut the factual findings of the MAR court with clear and convincing evidence. He simply re-asserts his arguments and asks this court to substitute its judgment. Therefore, Petitioner is unable to show that the MAR court's determination that he could not satisfy *Strickland* is unreasonable and fails to show the state court made an unreasonable determination of the facts.

With respect to his argument that counsel suffered from an actual conflict of interest, Petitioner is also unable to show the MAR court's determination is contrary to clearly established federal law or an

unreasonable determination of the facts. The Sixth Amendment right to counsel guarantees effective assistance of counsel, including the right to assistance free from conflicts. *See Strickland*, 466 U.S. at 688. A petitioner alleging that his Sixth Amendment rights were violated because his attorney was affected by a conflict of interest must show more than the possibility of a conflict. A petitioner must show that an actual conflict existed and that the conflict adversely affected counsel's performance. *Mickens*, 535 U.S. at 174; *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). However, once a petitioner shows an actual conflict adversely affected his representation by counsel, prejudice is presumed, and he is entitled to relief. *Cuyler*, 446 U.S. at 349-50; *Rubin v. Gee*, 292 F.3d 396, 401-02 (4th Cir. 2002). An actual conflict is one "*that affected counsel's performance* — as opposed to a mere theoretical division of loyalties." *Mickens*, 535 U.S. at 171 (emphasis in original).

Petitioner argues that a conflict existed because Worthington did not withdraw as counsel despite being a potential witness. He contends that he was not informed of the conflict and never waived any conflict. He therefore asserts that because an actual conflict existed that was not waived, prejudice must be presumed. However, the factual finding of the MAR court was that Worthington was not in a position to offer information about Petitioner's domestic case because he had not done any work on it. The MAR court also found that Worthington could not offer any testimony to help establish diminished capacity on the night of the murder. Petitioner's "actual conflict" argument is based on his position that counsel could

offer information at trial, specifically potentially exculpatory information, on these two issues. This factual conclusion was rejected by the MAR court and has not been rebutted by Petitioner. Consequently, Petitioner is unable to show an actual conflict existed or that counsel's performance was affected, and unable to show that the MAR court's ruling is contrary to clearly established law or an unreasonable determination of the facts.

Respondent's motion for summary judgment as to Claims II and III is granted.

3. Claim IV — Ineffective assistance of counsel on appeal

In Claim IV, Petitioner argues he received ineffective assistance of counsel on appeal because his attorney, David Belser, did not allege that Petitioner received ineffective assistance of counsel or was deprived of conflict free counsel as was eventually raised in the MAR. Petitioner argues that to the extent the claims of ineffective assistance of trial counsel were apparent from the record, appellate counsel acted objective unreasonably by not raising the claims on direct appeal. Petitioner asserts it is reasonably probable that but for appellate counsel's failure he would have received a new trial or sentencing hearing.

Petitioner first raised this claim in his MAR and the claim was denied on the merits. The MAR court reasoned that because Petitioner could not prevail on any of the underlying claims of ineffective assistance

of counsel, he could not show any prejudice due to counsel's failure to raise the claims. MAR Order at 40-41. The MAR court held that Petitioner had not shown the probability of a different outcome if the claims had been raised or that the failure to do so rendered his trial fundamentally unfair or unreliable. MAR Order at 41. Furthermore, the MAR court noted that appellate counsel, Mr. Belser, raised and briefed thirty-one assignments of error and raised an additional fourteen claims as preservation issues in a brief which was more than three hundred pages. The MAR court found that "defendant's direct appeal was extensive, exhaustive, and thorough." MAR Order at 41.

Effectiveness of appellate counsel is also governed by the standard set forth in *Strickland v. Washington*. *See Smith v. State of South Carolina*, 882 F.2d 895 (4th Cir. 1989). A petitioner must show that appellate counsel's representation "fell below an objective standard of reasonableness" and that a reasonable probability exists that, but for the error he would have prevailed on appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). The court must presume that counsel decided which "issues were most likely to afford relief on appeal." *Pruett v. Thompson*, 996 F.2d 1560, 1568 (4th Cir. 1993). Counsel is not required to raise every nonfrivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 752 (1983).

In raising this argument in the petition, Petitioner generally asserts that appellate counsel was ineffective for failing to raise the claims, but fails to state how the MAR court's ruling was contrary to, or an

unreasonable application of, clearly established federal law. While he may disagree with the MAR court's ruling, on this showing he cannot satisfy his burden of showing he is entitled to habeas relief under 28 U.S.C. § 2254. Further, as discussed above, Petitioner is not entitled to relief on the ineffective assistance of counsel arguments he contends appellate counsel should have raised on appeal. Therefore, Petitioner is unable to show prejudice due to appellate counsel's failure to raise the claims and unable to show that the MAR court's ruling denying his claim of ineffective assistance of counsel is an unreasonable application of clearly established federal law. Accordingly, Respondent's motion for summary judgment is granted on Claim IV.

D. Discussion of Claims Raised in the Amendment to the Petition

In the answer to the amendment to the petition and motion for summary judgment, Respondent argues that all of the claims raised in the amendment to the petition are time-barred. Respondent contends that the one-year period for filing a petition for writ of habeas corpus expired in 2002. He argues that the new claims, which were not filed until September 2004, do not relate back to the original petition, and therefore, are time-barred.

Title 28 U.S.C. § 2244(d)(1) establishes a one-year statute of limitation for habeas claims filed under 28 U.S.C. § 2254. The one year period runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered by the exercise of due diligence.

28 U.S.C. § 2244(d)(1). Only subsection A applies to Petitioner's case and therefore, Petitioner had one year from the "conclusion of direct review" to file his petition with this Court. *See* 28 U.S.C. § 2244(d)(1). The running of the one-year period is tolled during the time "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). An amendment to a pleading may relate back to the date of the original pleading when the claims arise out of the "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2).

The conclusion of direct review in Petitioner's case was on March 23, 1998, the date the Supreme Court denied certiorari review of his direct appeal. *See Gray v. North Carolina*, 523 U.S. 1031 (1998). The one-year period was running until Petitioner filed his MAR on March 5, 1999. The period was then tolled until the North Carolina Supreme Court denied certiorari review of the state Superior Court order on May 9, 2002. Petitioner timely filed his petition in this Court on May 20, 2002. At that time, more than three hundred fifty of the three hundred sixty-five days of the one-year filing period had expired. However, Petitioner's amendment to the petition was not filed until July 10, 2004, well more than a year after the one-year period had expired.

In response to the argument that the claims in the amendment are time-barred, Petitioner argues that because the claims in the amendment arise out of the same trial and sentencing proceeding, they relate back under Fed. R. Civ P. 15(c)(2). Renewed Cross-Motion for Summ. J. at 8. However, in *Mayle v. Felix*, 125 S. Ct. 2562 (2005), the Supreme Court considered and rejected this broad interpretation of conduct, transaction of occurrence. The Court held that "[aln amended habeas petition . . . does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Mayle*, 125 S. Ct. at 2566; *see also United States v. Pittman*, 209 F. 3d 314, 318 (4th Cir. 2000) (rejecting petitioner's argument that all claims arising from the same trial and sentencing proceeding arise of the same "conduct, transaction, or

occurrence."). "Relation back depends on the existence of a common 'core of operative facts' uniting the original and newly asserted claims." *Mayle*, 125 S. Ct. at 2572. "So long as the original and amended petition state claims that are tied to a common core of operative facts, relation back will be in order." *Id.* at 2574.

In the amendment, Petitioner first attempts to set forth extensive facts about an incident between Bob Worthington and his wife, Nancy Worthington, which occurred approximately three weeks before trial. Mr. Worthington was shot in the shoulder by Mrs. Worthington after a domestic dispute and the incident was covered by the local media. The police investigated the matter, but it was ultimately treated as an accidental shooting. Petitioner sets forth details surrounding the shooting and subsequent media coverage and suggests the facts belong "on or about page 15 of the Petition, primarily in connection with Claims 2, 3, and 4." Amendment to Petition at 1 n. 1. However, the facts set forth by Petitioner about the Worthington shooting do not stem from a common core of operative facts as the claim set forth in the petition. The fact that claims in the original petition and the new allegations rerly on the same legal ground or body of law does not permit Petitioner to raise those new arguments and have the claims relate back. *See, e.g.*, *United State v. Hernandez*, 436 F.3d 85 1 (8th Cir. 2006) (finding new claim of ineffective assistance could not relate back to original claim of ineffective assistance where claims not based on same set of facts); *Pittman*, 209 F.3d at 318 (finding new claim of improper enhancement could not relate back to

original claim of improper enhancement where claims stemmed from "wholly different conduct.").

In the original petition, Petitioner argued that counsel was ineffective or labored under a conflict of interest because he was a potential witness at trial on Petitioner's mental health or Petitioner's intention to comply with discovery in the domestic case. Although the information on the Worthington shooting is presented under the premise they are simply additional facts, not a new claim, the facts assert an entirely new and distinct basis for relief that Petitioner was prejudiced at trial because Worthington failed to withdraw as counsel after he was the victim of a domestic shooting several weeks before trial. Those arguments do not arise from a "common core of operative facts" as the original claims attacking counsel's representation. They arise from an entirely separate occurrence, and therefore, do not relate back to the original petition.[7]

Similarly, the other claims presented in the amendment to the petition do not share a "common core of operative facts" with the claims raised in the

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[7] In *Mayle*, in providing an example of when a claim might appropriately relate back, the Court cited to Moore's Federal Practice for the premise that "relation back ordinarily allowed 'when the new claim is based on the same facts as the original pleading and only changes the legal theory.'" *Mayle*, 125 S. Ct. at 2575 n.7 (citing 3 J. Moore, *et al.*., Moore's Federal Practice § 15.19[2], p. 15-82 (3d ed. 2004)). In contrast, Petitioner Gray is attempting to present entirely new facts to support a claim of ineffective assistance of counsel or that counsel suffered under a conflict of interest.

original petition. The claims in the amendment are: 1) the trial court unconstitutionally denied Gray's motion for a change of venue; 2) the jury instruction on the "heinous, atrocious, or cruel" aggravating factor was vague and unsupported by the evidence; 3) the aggravating circumstances were duplicative; and, 4) counsel failed to present expert testimony from a forensic pathologist. They all present new and distinct factual grounds for relief from the claims raised in the original petition.

Other than arguing the claims in the amendment should relate back because they all arise from the same trial and sentencing, Petitioner does not argue any other basis to show the amendment to the petition is properly before the court. Therefore, the claims and arguments raised in the amendment are time-barred. Respondent's motion for summary judgment with respect to all the claims raised in the amendment to the petition is granted.

E. Request for Evidentiary Hearing and Discovery

In his prayer for relief in the petition, Petitioner generally requests an evidentiary hearing. In his cross-motions for summary judgment he argues that if the court determines he is not entitled to summary judgment, it should grant him leave to conduct discovery and grant his request for an evidentiary hearing.

A federal habeas court must allow an "evidentiary hearing only where a factual dispute, *if resolved in petitioner 's favor*, would entitle him to relief and the

state has not afforded the petitioner a full and fair evidentiary hearing." *Rector v. Johnson*, 120 F.3d 551, 562-63 (5th Cir. 1997). During state post-conviction proceedings, Petitioner was afforded a full evidentiary hearing on his claims. Although he may disagree with the state court's determination, he fails to demonstrate that a factual dispute remains and that an evidentiary hearing is warranted.

With respect to his discovery request, Petitioner asks to conduct "discovery consisting of requests to produce all extant investigative records in the State's possession concerning the Worthington shooting, and depositions of Kinston Police Officers Tommy Lewis and Darrell Kierzek, Assistant District Attorney Imelda Pate, Mrs. Nancy Worthington and/or Bob Worthington." Renewed Cross-Motion at 16.

Rule 6 of the Rules Governing Section 2254 Cases provides that leave shall be granted to conduct discovery under the Federal Rules of Civil Procedure upon a showing of "good cause" by the petitioner. A petitioner shows "good cause" by presenting specific allegations that if fully developed would entitle him to relief. *Bracy v. Gramley*, 520 U.S. 899 (1997).

Petitioner has failed to show good cause for discovery. As discussed above, Petitioner's claims which relate to the Worthington shooting are time-barred and Petitioner is unable to demonstrate that if further facts were developed about the events, he would be entitled to relief on any of his claims. Accordingly, Petitioner's Motion for Leave to Conduct Discovery is denied.

CONCLUSION

For the reasons stated above, the court finds Gray has failed to establish he is in custody in violation of the Constitution or laws of the United States. He is not entitled to the relief requested and Respondent is entitled to judgment as a matter of law. Accordingly, Respondent's motions for summary judgment are GRANTED, Petitioner's cross-motions for summary judgment are DENIED. Petitioner's requests for an evidentiary hearings and discovery are DENIED and the petition for writ of habeas corpus is DISMISSED.

SO ORDERED, this 26 day of March 2006.

/s/
TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION
No. 5:02-HC-335-BO

[Filed: November 30, 2006]

WILLIAM ROBERT GRAY Petitioner,	)	
v.	)	ORDER
MARVIN POLK, Warden, Central Prison, Raleigh, North Carolina, Respondent.	)	

This matter is before the court on Petitioner's motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e). The matter is ripe for ruling.

BACKGROUND

In the motion, Petitioner argues that in ruling on the cross-motions for summary judgment in the order entered on March 28, 2006 ("the March 28th order"), the court improperly dismissed, or failed to consider, the factual allegations presented in paragraphs 52A through 52R of his amendment to the petition. In the March 28th order, the court found that the information set forth in the amendment, including, paragraphs

52A through 52R, was untimely. Petitioner argues that Respondent only challenged the relation back and timeliness of the claims raised in the amendment, not paragraphs 52A through 52R. Therefore, he contends the court dismissed the factual allegations in the amendment without first providing him notice and an opportunity to respond as required by law. *See McMillan v. Jarvis*, 332 F.3d 244 (4th Cir. 2003). In his motion to alter or amend judgment, Petitioner also argues that the court should reconsider the March 28th order with respect to its disposition of claim 1.

After considering his argument that he was not afforded notice that paragraphs 52 A through 52R might be time-barred, in an order filed on March 31, 2006, the court granted Petitioner an opportunity to present arguments and brief the court as to why should be considered timely.[1] Respondent was given an opportunity to file a response and the court now has the benefit of the briefing from the parties.

In the amendment to the petition, Petitioner labeled paragraphs 52A through 52R "Additional Allegations Regarding Pending Claims for Relief." These paragraphs set forth facts, argument, and law, all of which center on an incident in November 1993 several weeks before trial. During a domestic dispute, Mr. Worthington, one of petitioner's trial attorneys,

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[1] Any error that may have resulted from Petitioner's claim he was not on notice from respondent's answer and was not given an opportunity to respond has been rendered harmless by the court's order allowing him an opportunity to fully brief the issue. *See See McMillan v. Jarvis*, 332 F.3d 244, 250 (4th Cir. 2003).

was shot in the shoulder by his wife, Nancy Worthington. Mrs. Worthington was initially charged with felonious assault, but Mr. Worthington consistently claimed it was an accident and the charges were eventually dismissed against Mrs. Worthington.[2] Petitioner argued that the information in paragraphs 52A through 52R "logically belong on or about page 15 of the Petition, primarily in connection with Claims 2, 3, and 4." Amendment at 1 nl.

DISCUSSION

The United States Court of Appeals for the Fourth Circuit has recognized three grounds for amending a prior judgment pursuant to Rule 59(e): 1) to accommodate an intervening change in controlling law; 2) to account for new evidence not available at trial; or, 3) to correct a clear error of law or prevent manifest injustice. *See Pacific Ins. Co. v. American Nat'l. Fire Ins. Co.*, 148 F. 3d 396, 402 (4th Cir. 1998) (citing *EEOC v. Lockheed Martin Corp., Aero & Naval Sys.*, 116 F.3d 110, 112 (4th Cir. 1997); *Collision v. Int'l. Chem. Workers Union*, 34 F.3d 233, 236 (4th Cir. 1994)). Rule 59(e) motions may not be used to raise arguments which could have been raised prior to the issuance of the judgment or to re-litigate matters. *Hill*

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[2] Petitioner was aware of the incident and according to his version of the facts he spoke briefly with attorney Worthington about the matter before the case proceeded to trial. Worthington asked Gray if he had any problem with Worthington continuing to represent him, and Gray, who had retained Worthington as counsel, said no. Amendment at 2.

v. Braxton, 277 F.3d 701, 708 (4th Cir. 2002) (citing *Pacific Ins. Co.*, 148 F. 3d at 402).

A. The timeliness issue is properly before the court

As an initial matter, Petitioner fails to demonstrate the court is precluded from raising the timeliness issue *sua sponte*. Recently, the Supreme Court clarified that "district court's are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition." *Day v. McDonough*, -- U.S. --, 126 S. Ct. 1675, 1684 (2006). In *Day*, the Supreme Court held that a court is not precluded from dismissing a petition as untimely even if the State has answered the petition and not raised the issue. However, if the respondent "intelligently choose[s] to waive a statute of limitations defense," *id.* at 1685 n.11, a district court may not intervene and raise the timeliness issue, and the court must "assure itself that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue."[3] *Id.* at 1684

In his brief addressing the issue of timeliness, Petitioner argues that Respondent intelligently chose to waive a statute of limitations defense and therefore, the court is precluded from raising the issue. However, the information before the court does not indicate that Polk strategically or intelligently

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[3] In *Day*, the Court found the petitioner was not significantly prejudiced where petitioner was given notice by the court nine months after the State answered the petition and no court proceedings in the interim. *Day*, -- U.S. --, 126 S. Ct. at 1684.

withheld a defense. Respondent states he did not intend to waive a timeliness objection to the paragraphs insofar as they essentially raise a new claim or try to do so under the guise of facts relating back to the original claims. He notes that the paragraphs were not presented by petitioner as raising a new claim of conflict of interest because of the Worthington shooting. Therefore, the court finds Petitioner is unable to show that Respondent intelligently chose to waive the issue. Further, the court does not find petitioner is significantly prejudiced. Logic dictates that the mere fact a claim or petition will be time barred cannot alone establish prejudice or a time bar would never be permissible under these circumstances. Petitioner cannot otherwise show how he is prejudiced or that it is in the interest of justice for the court to consider the new information filed more than two years after the statute of limitation expired. Therefore, the court is not barred from considering the matter *sua sponte*.

B. Relation Back to the Original Petition

In support of his position that paragraphs 52A through 52R are timely, Petitioner first argues that the information in the paragraphs relates back to the original claims.[4] An amendment to a pleading may relate back to the original pleading when the claims in the amendment arise out of the same "conduct,

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[4] Although in the amendment to the petition and his Rule 59(e) motion he suggests that the paragraphs relate back to all of the claims in his petition, in his brief on timeliness he argues that "[t]he issue before the Court mainly concerns Claim 3." Brief at 2.

transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2). In *Mayle v. Felix*, 545 U.S. 644, 125 S. Ct. 2562 (2005), the Supreme Court considered the scope of the phrase "conduct, transaction, or occurrence" and rejected a broad definition. The Court held that "relation back depends on the existence of a common 'core of operative facts' uniting the original and newly asserted claims." *Mayle*, 545 U.S. at --, 125 S. Ct. at 2572. An amendment will not relate back "when it asserts a new ground for relief supported by facts that differ in both time and type" from those in the original pleading. *Id.* at --, 125 S. Ct. at 2566.

As the court discussed in the March 28th order, the facts set forth by Petitioner about the Worthington shooting do not stem from a common core of operative facts as the claims set forth in the petition. The court has considered Petitioner's arguments to the contrary, but finds that the information set forth in paragraphs 52A through 52R differs in time and type from the claims in the original petition.

In claim I of the petition, Petitioner argued he received ineffective assistance of counsel because his attorneys failed to investigate or present mitigating evidence at trial related to his emotional or mental condition at the time of the crime. In claim II, Petitioner argued he was denied effective assistance of counsel and a fair trial because Bob Worthington did not withdraw as counsel so that he could be a witness as to Petitioner's mental state on the night of the murder and as to the fact Petitioner had intended to comply with discovery in the domestic case. In claim

III, Petitioner argued he was denied conflict free counsel because Bob Worthington, knowing he was a potential witness as to Petitioner's mental state on the night of the murder and the fact Petitioner intended to comply with the discovery, failed to withdraw as counsel or inform Petitioner of the conflict.[5] In claim IV, Petitioner argued he received ineffective assistance of counsel on appeal because appellate counsel did not allege he received ineffective assistance of counsel or was deprived conflict free counsel.

Petitioner is unable to demonstrate that the original four claims and paragraphs 52A through 52R in the amendment, are tied to a common core of operative facts. The petitioner's original claims relate to counsel's interaction with petitioner on the night of the murder, his knowledge of petitioner's divorce case pre-dating the murder, and the failure to present mitigating evidence on petitioner's mental condition at the time of the murder. In contrast, the paragraphs in the amendment provide grounds for a claim of conflict of interest or ineffective assistance of counsel based upon a personal incident between counsel and his wife. The original claims involve events and facts before or at the time of the murder. The new paragraphs involve events which occurred nearly one year later. While the original claims asserted error because counsel did not bring forth evidence on petitioner's

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[5] As Petitioner concedes, although Respondent made reference to the facts of the Worthington shooting in the motion for summary judgment, Respondent specifically recognized that the facts and incident of the Worthington shooting were not encompassed by Petitioner's claim in the petition. Answer at 55.

mental state, the new facts assert error because a personal event in counsel's life was attracting media attention and possibly impacting his mental focus. The facts differ significantly in both time and type.

Paragraphs 52A through 52R clearly offer an entirely new and distinct ground for relief. The fact that the original claims also raised arguments of ineffective assistance of counsel or that counsel suffered from a conflict of interest cannot save the new allegations from being time-barred.[6] Case law specifically rejects the premise that because new factual allegation and old allegations rely on the same body of law the new allegations may relate back. *See United States v. Pittman*, 209 F.3d 314, 318 (4th Cir. 2000) (finding that new claim of improper enhancement could not relate back to original claim of improper enhancement where claims stemmed from "wholly different conduct."); *see also United States v. Hernandez*, 436 F.3d 851 (8th Cir. 2006) (finding new claim of ineffective assistance of counsel could not relate back to original claim of ineffective assistance of counsel where claims not based on same set of facts).

Furthermore, although petitioner asserts paragraphs 52A through 52R should be allowed to supplement his original claims, especially claim III, the information in those paragraphs do not aid his position in the context of the claims as originally presented. In fact, when the court considers the

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[6] Which it appears petitioner understood as he presented law and argument along with the facts in that section of the amendment.

"additional" facts presented in paragraphs 52A through 52R in the context of claims I through IV in the petition, the court finds these facts have no impact on the court's treatment of the claims or its ruling in the March 28th order. These additional facts do not show that the MAR court's ruling with respect to the petitioner's arguments raised in the original petition are contrary to, or an unreasonable application of, clearly established federal law or that the MAR court made an unreasonable determination of the facts.

C. Equitable Tolling

Petitioner is also unable to demonstrate that equitable tolling should apply to prevent a procedural bar of paragraphs 52A through 52R. The Fourth Circuit has recognized that AEDPA's one-year statute of limitations may be subject to equitable tolling. *See Harris v. Hutchinson*, 209 F.3d 325 (4th Cir. 2000). Equitable tolling is usually applied in one of two situations: first, where the person seeking relief has been prevented from asserting his claim by some kind of wrongful conduct by the opposing party; and second, where "extraordinary circumstances beyond [plaintiff's] control" made it impossible to file timely. *Id.* at 330. The Fourth Circuit has emphasized that equitable tolling is only for the most exceptional cases. *Id.*

Petitioner is unable to show that extraordinary circumstances exist that make it appropriate to toll the one year period in his case. Petitioner's original petition was filed in the court on March 20, 2002, and at that time more than three hundred fifty days of the

one-year filing period had expired. The original petition was filed by Stanley Hammer and John Bryson, the attorneys who represented petitioner in State post-conviction proceedings. At the time the petition was filed, counsel noted petitioner's desire for new counsel and at nearly the same time, petitioner filed a *pro se* request for new counsel.[7]

The court appointed Edwin West and Heather Wells and they were given a period of time in which to supplement the petition. Subsequently, in an *ex parte* status report filed with the court on May 20, 2003, counsel indicated that after researching and reviewing the matter, they had decided not to add claims to the petition. Approximately five months later, in October 2003, Mr. West and Ms. Wells filed a request to withdraw as counsel of record. After an *in camera* hearing, the court allowed counsel to withdraw. The court appointed Paul Green and Matt Stiegler as new counsel. They ultimately filed the amendment on July 12, 2004, more than two years after the one-year filing period had expired.

In his brief on the issue of timeliness, petitioner makes a blanket assertion that equitable tolling should apply, but does not explain on what basis.[8] In his motion to alter or amend judgment, petitioner

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[7] As the record reflects, Petitioner has a history of dissatisfaction with counsel and seeking new attorneys.

[8] Notably, in originally responding to the time-barred arguments asserted in respondent's motion for summary judgment on the amendment, Petitioner did not assert that equitable tolling should apply.

generally suggests that perhaps the procedural history surrounding the appointment of counsel in this case could serve as a basis for equitable tolling. However, petitioner is mistaken. The procedural history surrounding the appointment of counsel might serve as a basis for equitable tolling, at best, if the amendment had been filed by Mr. West and Ms. Wells. However, Mr. West and Ms. Wells, after thoroughly reviewing the matter chose not to file an amendment.

As petitioner is aware, Mr. West and Ms. Wells were not allowed to withdraw so that new counsel could be appointed who would raise additional claims or supplement the petition. Rather, the court determined for reasons unrelated to the content of the petition or the claims filed that Mr. West and Ms. Wells should be allowed to withdraw as counsel of record. Therefore, Petitioner fails to show that his history with counsel, or any other basis, exists to support equitable tolling of the paragraphs 52A through 52R filed more than two years after the statute of limitations expired. Accordingly, the court again finds, as it ruled in its March 28th order, that paragraphs 52A through 52R of the amendment to the petition are time-barred and not properly before the court.

Further, insofar as the motion to alter or amend judgment seems to request that the court considered equitable tolling with respect to the claims in the amendment, especially claim VIII, petitioner's request is denied. As noted above, Rule 59(e) motions may not be used to raise arguments which could have been raised prior to the issuance of the judgment or to

re-litigate matters. *Hill*, 277 F.3d at 708 (4th Cir. 2002) (citing *Pacific Ins. Co.*, 148 F. 3d at 402). Petitioner does not dispute that respondent' s motion for summary judgment of the amendment clearly asserted that the claims raised in the amendment were time-barred. In response, Petitioner argued only that the claims should be allowed to "relate back" to the original petition. Petitioner did not raise an equitable tolling argument and he may not, under the guise of a Rule 59(e) motion, assert this new argument which could have been raised in his response to the motion for summary judgment.

D. Treatment of Claim I

In the motion to alter or amend judgment, in addition to his arguments regarding the court's treatment of paragraphs 52A through 52R, Petitioner also asks the court to alter or amend its judgment with respect to its treatment of claim I in the March 28th Order. Petitioner argues that the court's order appears to overlook some of the evidence presented in support of his claim and contends "[t]he Order's dispostion of Claim I does not sufficiently recognize the strength of this claim in light of the record as a whole and in many other particulars set forth in petitioner's pleadings." Motion at 17. In reaching its ruling in the March 28th Order, the court considered all of the evidence in the record. Petitioner's argument in support simply re-asserts what he considers to be the strongest evidence supporting his claim. Rule 59(e) motion is not meant to give an "unhappy litigant one additional chance to sway the judge." *Durkin v. Taylor*, 444 F. Supp. 879, 889 (E.D. Va. 1977). He fails

to show an intervening change in controlling law, new evidence, or a clear error of law that would support amending the judgment.

CONCLUSION

For the reasons set forth above, Petitioner's motion to alter or amend judgement is DENIED. SO ORDERED, this 29 day of November 2006.

/s/
TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
LENOIR COUNTY
No. 92CRS11650

[FILED: December 13, 2000]

STATE OF NORTH CAROLINA	)	
v.	)	ORDER
WILLIAM ROBERT GRAY, JR.,	)	
Defendant	)	

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THIS MATTER coming on to be heard before the undersigned Superior Court Judge upon defendant's Motion for Appropriate Relief, and the State's Answer, and, Motion to Deny Defendant's Motion for Appropriate Relief on the Pleadings, and after reviewing the documents attached thereto, the trial transcript, record on appeal, defendant and State's direct appeal briefs, and the testimony and evidence presented during an evidentiary hearing on defendant's claims held July 21-22, 1999, the Court finds the following:

PROCEDURAL HISTORY

1. On May 10, 1993, defendant, William Robert Gray, Jr., was indicted by the Lenoir County Grand Jury for the first degree murder of his wife, Roslyn Gray.

2. Defendant was tried capitally at the November 1, 1993, Criminal Session of Superior Court, Lenoir, County, the Honorable Paul M. Wright, Judge presiding.

3. At trial, defendant was represented by Mr. Bob D. Worthington and Mr. Dal F. Wooten.

4. The jury found defendant guilty as charged.

5. The jury recommended the death penalty which the trial court duly imposed on December 15, 1993.

6. On October 3, 1997, the Supreme Court of North Carolina affirmed the conviction and sentence of defendant. *State v. Gray*, 347 N.C. 143, 491 S.E.2d 538 (1997). The United States Supreme Court denied *certiorari* in defendant's case on March 23, 1998. *Gray v. North Carolina*, __ U.S. __, 118 S.Ct. 1323, 140 L.Ed.2d 486 (1998).

7. On or about July 14, 1998, Mr. Stanley F. Hammer and Mr. John D. Bryson were appointed to represent defendant on post-conviction matters.

8. On or about March 5, 1999, defendant timely filed a Motion for Appropriate Relief [hereinafter "MAR"].

9. On or about May 14, 1999, the State filed its Answer, and Motion to Deny Defendant's MAR on the Pleadings.

10. On July 21-22, 1999, an evidentiary hearing on defendant's claims presented in his Motion for Appropriate Relief was held in Superior Court, Lenoir County pursuant to N.C.G.S. § 15A-1420.

11. At the evidentiary hearing held on July 21-22, 1999, in Lenoir County, defendant was represented by Mr. Stanley F. Hammer and Mr. John D. Bryson. The State was represented by Special Deputy Assistant Attorney General Steven M. Arbogast and Assistant District Attorney Imelda Pate.

FACTUAL SETTING

The factual circumstances of the crime are summarized in *State v. Gray*, 347 N.C. 143, 491 S.E.2d 538 (1997), *cert. denied*, __ U.S. __, 118 S.Ct. 1323, 140 L.Ed.2d 486 (1998).

STANDARD OF REVIEW

1. The Court has assessed the claims in defendant's MAR pursuant to the standards in N.C.G.S. § 15A-1420 (1996) and *State v. McHone*, 348 N.C. 254, 499 S.E.2d 761 (1998).

2. Defendant's claims of ineffective assistance of counsel have been assessed pursuant to the standards in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, *reh'g denied*, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984), and *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985) (adopting two-part test of *Strickland*).

3. Defendant's claims that the State asserts are procedurally barred have been assessed pursuant to the standards set out in N.C.G.S. § 15A-1419 (1996).

CLAIM I

1. In this claim defendant alleges that he was denied effective assistance of counsel. Defendant bases this claim on the assertion that his trial counsel, attorney Worthington, should have withdrawn as trial counsel and testified as a witness for defendant. Defendant identifies four areas in which he alleges that the testimony of attorney Worthington is relevant and material: 1. Defendant's mental and emotional state on the night of the murder; 2. Defendant's intention to comply with court ordered discovery in the divorce action; 3. The reaction of defendant's children to the murder; and, 4. Whether attorney Worthington was improperly shielded from defendant while defendant was inside his home with police and investigators on the night of the murder.

2. *Matthews v. Evatt*, 105 F.3d 907 (4th Cir.), *cert. denied sub nom., Matthews v. Moore*, __ U.S. __, 118 S.Ct. 102, 139 L.Ed.2d 57(1997), summarizes the test for reviewing claims of ineffective assistance of counsel as follows:

> The test for reviewing claims of ineffective assistance of counsel is well established. First, the petitioner must demonstrate counsel's performance fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-91, 104 S.Ct. 2052, 2064-67,

80 L.Ed.2d 674 (1984). In other words, the petitioner must demonstrate counsel's performance was "deficient." *Griffin v. Warden*, 970 F.2d 1355, 1357 (4th Cir. 1992). "Deficient performance" is not merely below-average performance; rather, the attorney's actions must fall below the wide range of professionally competent performance. *Id.* Second, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. . . . Finally, we must presume counsel's assistance was effective:

> Judicial scrutiny of counsel's performance must be highly deferential . . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption

> that, under the circumstances, the challenged action might be considered sound trial strategy.
>
> *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065 (citation and internal quotes omitted).

105 F.3d at 919. *Accord Eaton v. Angelone*, 139 F.3d 990, 994 (4th Cir.) ("We review the performance of counsel with a spirit of deference. 'It is all too tempting . . . to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. (Citation omitted).'"), *cert. denied*, __ U.S. __, 118 S.Ct. 2338, 141 L.Ed.2d 709 (1998).

3. The *Strickland* test is the test for ineffective assistance of counsel under the North Carolina Constitution. *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985); *State v. Mason*, 337 N.C. 165, 446 S.E.2d 58 (1994).

4. *Huffington v. Nuth*, 140 F.3d 572 (4th Cir.), *cert. denied*, __ U.S.__, 119 S.Ct. 444, 142 L.Ed.2d 399 (1998), discussing *Strickland* , states:

> The *Strickland* test seeks to root out deficient performance that renders a trial unfair to a criminal defendant. "Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their

attorneys will be granted the writ...." *Kimmelman v. Morrison*, 477 U.S. 365, 382, 106 S.Ct. 2574, 2587, 91 L.Ed.2d 305 (1986). The inquiry as to whether counsel rendered objectively reasonable assistance is necessarily deferential and depends upon the circumstances of the individual case. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. In fact, "to eliminate the distorting effects of hindsight," *id.* at 689, 104 S.Ct. at 2065, courts must evaluate the challenged performance "as of the time of counsel's conduct." *Id.* at 690, 104 S.Ct. at 2066. "[T]hat is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (internal quotation marks omitted).

But even objectively unreasonable performance does not require a court to disturb a verdict unless the unreasonable performance has adversely affected the defense. Under the prejudice prong of *Strickland*, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. Given that the ultimate concern is the fundamental fairness and reliability of the outcome of the trial, when making the prejudice determination a court "must consider the

> totality of the evidence before the judge or jury." *Id.* at 695, 104 S.Ct. at 2069. Moreover, when evaluating prejudice a court may consider all aspects of the evidence proffered by the petitioner, including aspects both beneficial and detrimental to petitioner's case. *See,* e.g., *Whitley v. Bair,* 802 F.2d 1487, 1493-96 (4th Cir.1986) (any mitigating evidence that trial counsel might have developed would have been accompanied by aggravating evidence, and thus the alleged failure to develop the evidence did not result in prejudice).

140 F.3d at 578.

Defendant's mental and emotional state on the night of the murder

5. Defendant's first contention under this claim, that attorney Worthington should have withdrawn to testify regarding defendant's mental or emotional state on the night of the murder fails to meet either the unreasonable performance or prejudice components of *Strickland.* Prior to the events of November 24, 1992, attorney Worthington's contact with and opportunity to observe defendant's demeanor and mental state marginal at best. (EHT pp. 64-65, 69, 97-98). This Court finds that attorney Worthington's contact with defendant on the night of the murder was exclusively after the murder and in the course of attorney Worthington's representation of defendant. Attorney Worthington had no contact with defendant prior to or immediately after the shooting of Roslyn Gray on the

night of her murder. (EHT pp. 47-50). Attorney Worthington's first opportunity to observe and interact with defendant occurred after defendant had been transported to the Kinston Police Department for questioning. (EHT pp. 100-01).

6. Attorney Worthington testified at the evidentiary hearing that he spoke with the defendant for at least an hour at the Kinston Police Department prior to any police questioning of defendant. Attorney Worthington found the defendant rational, coherent, and fully aware of his situation and attendant circumstances. Attorney Worthington testified that he allowed defendant to be interviewed by investigators and would not have agreed to any such interviews if he had any concerns regarding the defendant's mental condition or state. (EHT, pp. 103, 105-06). Furthermore, attorney Worthington clarified his meaning that the defendant appeared dazed on the night of his wife's murder, stating that he meant haggard, worn out, tired, and frustrated. (EHT pp. 116-117).

7. It is this Court's opinion that defendant's contention under this claim would place every defense attorney who renders legal aid and counsel to a client in the position of becoming a "witness", necessitating withdrawal as counsel. This Court finds that attorney Worthington's actions in not withdrawing as counsel for defendant in order to testify to defendant's mental or emotional state on the night of the murder is reasonable and falls within the wide range of professionally competent performance.

8. This aspect of defendant's claim also fails due to a lack of prejudice sufficient to satisfy *Strickland*'s second prong. The test for prejudice established in *Strickland* is that "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698.

9. The test for prejudice is not conducted in an evidentiary vacuum. The overall strengths and weakness of the State's case are critical factors in the examination for prejudice resulting from any alleged professional errors on trial counsel's part. As *Strickland* points out ". . . a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming support." *Strickland*, 466 U.S. at 696, 104 S.Ct. at 2069. Numerous police officers and officials testified regarding defendant's mental and emotional state immediately following the murder of defendant's wife. Officers Neal Flowers, and Donald Ray Nichols both observed defendant while the preliminary investigation was ongoing at defendant's residence and during subsequent questioning at police headquarters.. Major W.L. "Speedy" Ingram was present at defendant's residence and observed defendant's demeanor as well. All testified that defendant was in control of his faculties throughout the evening.

10. This Court finds this aspect of the claim is without merit and is denied for the above stated reasons.

Defendant's intention to comply with court ordered discovery in the divorce action

11. Defendant's assertion that attorney Worthington should have withdrawn in order to testify regarding defendant's "intention" to comply with a discovery order in the divorce case fails to satisfy either the performance or prejudice analysis of *Strickland*. This court finds that attorney Worthington had been retained as counsel for defendant in the divorce action less than two weeks before the murder of Roslyn Gray. At defendant's trial, defendant testified that he intended to work preparing responses to the discovery interrogatories after the Thanksgiving holiday. This court finds it relevant that the murder of Roslyn Gray occurred before the Thanksgiving holiday. Defendant also testified that he, the defendant, had commenced working to some extent on the discovery response by himself.

12. Attorney Worthington testified that he personally had done no work whatsoever on the civil divorce case prior to the murder of Roslyn Gray. (EHT p. 119). In attorney Worthington's opinion he could have testified to nothing that was not otherwise introduced at defendant's trial. (EHT p. 119). The testimony at the evidentiary hearing confirmed defendant's trial testimony that attorney Worthington and defendant agreed to work on the civil discovery

issues after the Thanksgiving holiday. (EHT pp. 65, 119).

13. Defendant's attorney expert, Mr. Rudolph A. Ashton, III, testified at the evidentiary hearing that attorney Worthington would have been able to testify to various aspects of defendant's ongoing civil divorce action prior to the murder of Rosalyn Gray. (EHT pp. 14-16). Based upon the evidence of record and the testimony of attorney Worthington, the Court does not agree with this assertion. Attorney Worthington's testimony established that he had no prior involvement with defendant's divorce action. Attorney Worthington's testimony established that he had no personal knowledge of any fact of consequence regarding defendant's civil divorce case. (EHT pp. 65, 119).

14. Attorney Ashton testified that based upon the information he was provided and reviewed, he believed that attorney Worthington was a friend and "neighbor" of defendant. The Court finds that the evidence of record and the testimony of attorney Worthington establishes that the defendant and attorney Worthington did not live in close proximity to one another, they were not "neighbors". (EHT pp. 48, 97). Additionally, the testimony of attorney Worthington established that defendant and attorney Worthington were not "friends" having had minimal social contact with defendant or his family prior to the murder of Rosalyn Gray. (EHT pp. 97-98).

15. This Court finds that attorney Worthington had no substantive involvement in preparing any

response to the discovery order prior to the murder of Roslyn Gray. Defendant testified at his trial that he intended to comply with the discovery order. Attorney Worthington can add little more than the fact that defendant expressed an "intent" to comply. His testimony would be merely cumulative. Attorney Worthington possesses no substantive testimony to offer. This court finds that attorney Worthington's actions in not withdrawing as trial counsel for defendant so as to be able to testify as a witness for defendant in the area of defendant's intention to comply with the discovery order is reasonable and falls within the wide range of professionally competent performance.

16. This Court finds that defendant can show no prejudice sufficient to satisfy the second prong of *Strickland* from attorney Worthington's failure to withdraw as trial counsel and testify regarding the discovery order and defendant's intention to comply. Defendant testified at his trial that he intended to comply. Defendant's testimony was that he intended to work on the responses after the Thanksgiving holiday. This court finds that defendant himself presented to the jury the only evidence of substance regarding what his, the defendant's, "intentions" were regarding responding to the discovery order. The failure of attorney Worthington to withdraw and testify regarding the expressed "intentions" of defendant to comply with the discovery order in the divorce case does not render the results of defendant's trial fundamentally unfair or unreliable. There is no likelihood that the outcome of defendant's trial would be different.

17. This aspect of the claim is without merit and is denied for the above stated reasons.

The reaction of defendant's children to the murder of Rosalyn Gray

18. The evidence at trial and the testimony at the evideritiary hearing established that prior to the murder of Roslyn Gray, attorney Worthington had minimal social contact with defendant and his family. (EHT pp. 69, 97). Attorney Worthington had been retained to represent defendant in the divorce action several weeks prior to the murder of Roslyn Gray. Attorney Worthington had defendant's children in his custody for the brief period of approximately November 25, 1993 until December 1, 1992. The evidence of record also established that on or about December 1, 1992, defendant's children were placed in the custody of Mr. Donald Hollowell and resided with the Hollowell family through the time of defendant's trial. (EHT pp. 54, 121). The Hollowell family had been close social friends of defendant and his family for a number of years prior to the murder of Roslyn Gray. Mr. Hollowell and Rob Gray, III, testified both at the guilt/innocence phase and sentencing phase of defendant's trial. Mrs. Hollowell and Dara Gray testified at the sentencing phase.

19. This Court finds that the Hollowells' and defendant's children are witnesses with the detailed and comprehensive information in the areas raised by this aspect of defendant's claim. These witnesses did testify regarding the relationships within the Gray family. Any information attorney Worthington might

add would be sparse, limited, and ultimately cumulative. This Court finds that the actions of attorney Worthington in not withdrawing as trial counsel in order testify for defendant about his relationship with his children and the children's reaction to the murder of their mother falls within the wide range of professionally competent performance protected by the *Strickland* umbrella.

20. Attorney Worthington testified that he specifically discussed with defendant the issue of either retaining custody of defendant's children or representing defendant at trial. Attorney Worthington informed the defendant that he could not do both. (EHT pp. 81-82). Defendant informed attorney Worthington that his desire was that he continue to represent defendant. (EHT pp. 82, 121-22, 178-79).

21. Assuming *arguendo* that the type of testimony regarding defendant's relationship with his children and the children's reaction to the murder of their mother that defendant would offer through attorney Worthington is admissible, defendant fails to establish prejudice under *Strickland*'s second prong. The information defendant alleges attorney Worthington can testify to is available in greater depth and detail from other witnesses. The Hollowell family had been close social friends of defendant and his family for years prior to the murder of Roslyn Gray. Defendant's children lived with the Hollowell family during the year between the murder and defendant's trial. Defendant's children and Mr. and Mrs. Hollowell all testified at defendant's trial, either at guilt/innocence, sentencing or both.

22. This court finds that any testimony by attorney Worthington would be cumulative and of marginal relevance. Defendant was not deprived of testimony in the areas alleged in this aspect of the claim. This Court finds no prejudice that would satisfy *Strickland*'s second prong. The failure of attorney Worthington to withdraw as trial counsel and testify on defendant's behalf does not render the result of defendant's trial fundamentally unfair or unreliable. There is no possibility that the outcome of defendant's trial would be different.

23. This aspect of the claim is without merit and is denied for the above stated reasons.

Whether attorney Worthington was shielded from defendant

24. Defendant's allegation that attorney Worthington should have withdrawn as trial counsel in order to testify on the issue of whether he, attorney Worthington, was improperly shielded from defendant by the police at defendant's home on the evening of the murder can be resolved by going directly to an examination for prejudice under *Strickland*. The evidence of record and from the evidentiary hearing established that at the time defendant murdered his wife, attorney Worthington represented defendant in a civil divorce action.

25. On the evening of Rosyln Gray's murder, attorney Worthington never entered defendant's residence and thus can not testify as to what occurred or was said between defendant and any police officials

inside the home. (EHT p. 100). During the course of motion hearings the evidence established that defendant agreed to accompany Detective Neal Flowers to police headquarters for questioning. Defendant told both Detective Flowers and Major "Speedy" Ingram that he wanted attorney Worthington to be present for the questioning at the police station.

26. Attorney Worthington testified that he was at the home of defendant, was notified of defendant's request, and proceeded to police headquarters where he subsequently advised and represented defendant throughout the questioning that took place. (EHT pp. 48-49).

27. This Court finds that whether or not attorney Worthington was improperly "shielded" or denied access to defendant inside defendant's home, defendant shows no prejudice. All statements made by defendant inside his home were suppressed by the trial court based upon violation of *Miranda*. This court finds that the trial court cured any harm to defendant that may have resulted from not having access to attorney Worthington while inside his home. While being questioned at police headquarters, defendant was afforded the opportunity to consult with attorney Worthington. (EHT pp. 102-06). There is no possibility that the outcome of defendant's trial would be affected by testimony of attorney Worthington on this aspect of the claim. The result of defendant's trial is fundamentally fair and reliable. There is no reasonable probability of the outcome being different.

28. This aspect of the claim is without merit and is denied for the above stated reasons.

29. This Court finds that this entire claim is without merit. Attorney Worthington's failure to withdraw as counsel and testify as a witness for defendant does not fall below the wide range of professionally competent performance required of *Strickland*'s first prong. Additionally, this Court finds that defendant has failed to establish any prejudice under the second prong of the *Strickland* standard.

CLAIM II

1. In this claim defendant alleges that he was deprived of conflict free counsel as a result of attorney Worthington's failure to withdraw as trial counsel and testify for defendant. The factual circumstance of this claim are nearly identical with those of Claim I which allege ineffective assistance of counsel. The specific subject matter on which it is alleged attorney Worthington would offer testimony is: 1. Defendant's mental and emotional state on the night of the murder; 2. Defendant's intention to comply with court ordered discovery in the divorce action; 3. The reaction of defendant's children to the murder; and, 4. Whether attorney Worthington was improperly shielded from defendant while defendant was inside his home with police and investigators on the night of the murder. Defendant adds an additional basis for alleging attorney Worthington's representation was clouded by a conflict of interest: at the time of defendant's trial, attorney Worthington's wife was pending charges for a felonious assault which would potentially be

prosecuted by the same District Attorney's Office that was prosecuting defendant.

2. *State v. Walls*, 342 N.C. 1, 463 S.E.2d 738 (1995), *cert. denied*, 517 U.S. 1197, 116 S.Ct. 1694, 134 L.Ed.2d 794 (1996) provides the pertinent authority in evaluating defendant's claims of conflict of interest, stating, *inter alia*:

> The United States Supreme Court, in *Curler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), determined that "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 348, 100 S.Ct. at 1718, 64 L.Ed.2d at 346-47. . . .
>
> The Court held "that the possibility of conflict is insufficient to impugn a criminal conviction." *Id.* at 350, 100 S.Ct. at 1719, 64 L.Ed.2d at 348.
>
> . . . .
>
> Even assuming, arguendo, that defense counsel did actively represent conflicting interests, defendant has not shown this Court that the alleged dual representation actually affected the adequacy of his representation. In fact, our review of the record reveals that defendant received a quite vigorous and spirited defense. We note that co-counsel, Mr.

> Harvey, rather than Mr. Warmack conducted the cross-examination of witness Norwood. This fact, while not dispositive in and of itself, is significant when considered with the quality of the representation overall and the cross-examination, considering in particular whether opportunities for impeachment were ignored.

342 N.C. at 39-41, 463 S.E.2d at 757-58. *Accord State v. Bruton*, 344 N.C. 381, 391, 471 S.E.2d 336, 343 (1996) (defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance); *State v. Yelton*, 87 N.C.App. 554, 361 S.E.2d 753 (1987)(under North Carolina Rules of Professional Conduct, defense counsel has an ongoing professional and ethical obligation to avoid representing conflicting interests).

3. This Court also is guided by the following federal authority: *United States v. Magini*, 973 F.2d 261, 263-64 (4th Cir. 1992); *Spreitzer v. Peters*, 114 F.3d 1435, 1452 (7th Cir. 1997) (defendant could not show either an actual conflict or an adverse affect on his defense because "[t]here is absolutely no evidence in the record that Ward or Anfinson was somehow affected by having a former prosecutor as a colleague or a supervisor. Spreitzer received a vigorous and thorough defense."), *cert. denied*, __ U.S. __, 118 S.Ct. 1060, 140 L.Ed.2d 121 (1998); *Paradis v. Arave*, 130 F.3d 385, 391 (9th Cir. 1997) (Trial counsel Brown was employed as a city park police officer when he was appointed to represent Paradis and while he represented Paradis at his trial. No conflict of interest

because there was no showing that Brown actively represented conflicting interests. "[n]o conflict of interest flows *e.o. ipso* from Brown's additional employment. Potentially divided allegiances do not constitute active representation of conflicting interests."); *Garcia v. Bunnell*, 33 F.3d 1193, 1199 (9th Cir. 1994), *cert. denied*, 514 U.S. 1024, 115 S.Ct. 1374, 131 L.Ed.2d 229 (1995) (mere fact of future employment as prosecutor did not engender conflict of interest for defense attorney); *Hernandez v. Johnson*, 108 F.3d 554, 559-560 (5th Cir.) (Rejecting Hernandez's contention that Borchers's service as district attorney during the period of appellant's prior convictions created an actual conflict of interest that adversely affected Borchers's performance under Curler. "In addition to actual conflict, petitioner must show adverse effect, meaning that "some plausible defense strategy or tactic might have been pursued but was not, because of the conflict of interest."), *cert. denied*, __ U.S. __, 118 S.Ct. 447, 139 L.Ed.2d 383 (1997); *Perillo v. Johnson*, 79 F.3d 441, 449 (5th Cir.1996) ("A mere possibility of conflict does not raise a presumption of prejudice."); *United States v. Herrera-Zuleta*, 113 F.3d 1243 (9th Cir. 1997) (unpublished), (An actual conflict, as opposed to the mere possibility of a conflict, is necessary to establish ineffective assistance. To support a showing of actual conflict, the record must contain evidence that the alleged conflict affected the attorney's behavior.); *United States v. Thomas*, 114 F.3d 228, 252 (D.C. Cir.) (Defendant can prevail on a conflict of interest claim--a type of ineffective assistance of counsel claim--under *Curler* if the defendant can show (1) that his lawyer acted under an actual conflict of interest, and (2) that

the conflict had some negative effect upon his defense, defined as "an actual lapse in representation"), *cert. denied*, __U.S. __, 118 S.Ct. 635, 139 L.Ed.2d 614 (1997); *United States v. Bruce*, 89 F.3d 886 (D.C. Cir. 1996) (not every shortcoming of counsel can be classified as a "conflict of interest," and defendant must demonstrate that allegedly conflicted counsel advanced his own, or another client's, interests to the detriment of defendant-client to establish a *Curler* claim.); *Stoia v. United States*, 109 F.3d 392, 97(7th Cir. 1997) (An "adverse effect" occurs when a lawyer's actual conflict of interest causes a "lapse in representation contrary to the defendant's interests."); *United States v. Mays*, 77 F.3d 906 (6th Cir. 1996) ("[T]o establish a conflict of interest, defendant must point to specific instances in the record to suggest an actual conflict or impairment of his interests. . . . There is no violation where the conflict is irrelevant or merely hypothetical; there must be an actual significant conflict. . . . [D]efendant must show not only a conflict but also that the conflict caused the attorney to make bad choices for his client."); *United States v. Cook*, 45 F.3d 388, 393 (10th Cir. 1995) (the possibility of conflict is insufficient to impugn a criminal conviction. Defendant must show "counsel actively represented conflicting interests" and that the "conflict of interest adversely affected his lawyer's performance." (Citation omitted). Once an actual conflict and an adverse effect are shown, a defendant "need not demonstrate prejudice in order to obtain relief" (citation omitted)."); *Vance v. Lehman*, 64 F.3d 119, 124-25 (3d Cir. 1995), *cert. denied sub. nom., Vance v. Horn*, 516 U.S. 1059, 116 S.Ct. 736, 133 L.Ed.2d 686 (1996); *United States v. Jones*, 52 F.3d

924, 926 (11th Cir.) (In reviewing a claim of conflict of interest, it is important to keep in mind that the purpose of providing assistance of counsel is simply to ensure that criminal defendants receive a fair trial.), *cert. denied*, 516 U.S. 902, 116 S.Ct. 265, 133 L.Ed.2d 187 (1995).

4. This Court finds that the evidence of record shows that defendant made no objection to any real or perceived conflict of interest resulting from attorney Worthington's representation.

5. Attorney Worthington testified at the evidentiary hearing that he discussed with defendant the fact that he, attorney Worthington, could not retain custody of defendant's children and continue to represent defendant at trial. (EHT pp.81-82, 121-22, 178-79). This Court finds that defendant waived any real or potential conflict of interest when he informed attorney Worthington that his desire was that attorney Worthington continue to represent defendant. (EHT pp 119, 121-22). Ms. Yvonne Taylor testified at the evidentiary hearing that she was present when attorney Worthington informed defendant of the choice he would have to make and that defendant did in fact request that attorney Worthington continue to represent defendant. (EHT pp. 178-79).

6. Attorney Worthington testified at the evidentiary hearing that he discussed with defendant the accidental shooting of attorney Worthington that occurred on the eve of defendant's trial. The Court finds that defendant was aware that attorney Worthington had been shot by his wife and elected to

continue with attorney Worthington as his trial defense counsel. (EHT pp. 83-85, 125-26). The Court further finds that at the time of defendant's trial attorney Worthington was not pending any charges related to his shooting. The Court finds that defendant has failed to present any evidence that attorney Worthington's wife's situation adversely affected his representation of defendant. (EHT pp. 122-25).

7. Attorney Dal Wooten, defendant's second trial defense counsel, testified at the evidentiary hearing that in his opinion attorney Worthington lost a measure of "focus" subsequent to his wounding. (EHT pp. 136, 141, 144-45). Attorney Wooten further testified that he did not believe that attorney Worthington was unable to work on the case or that he was mentally impaired nor did he feel a need to speak with attorney Worthington regarding any concerns or suggestion that attorney Worthington withdraw as counsel. (EHT pp. 136, 145-46). The Court finds that the accidental shooting of attorney Worthington did not create any conflict of interest, real or potential, that required attorney Worthington to withdraw as counsel for defendant.

8. The analysis pertaining to attorney Worthington's viability as a potential witness in each of the areas specified under this claim set forth in the previous section, Claim I, of this Order is applicable to this Claim as well, and is incorporated herein by reference. Attorney Worthington's failure to withdraw as trial counsel and testify as a witness for defendant did not have any affect on the adequacy of

representation provided to defendant for the reasons stated in the Court's analysis of Claim I.

9. This Court has examined the transcript of defendant's trial. The record is the best and most telling evidence that convinces this Court that attorney Worthington presented an aggressive, zealous, and exhaustive defense that was free of any conflict of interest that hindered or adversely affected attorney Worthington's efforts. (EHT p. 118).

10. This Court finds that defendant affirmatively waived any conflict of interest, real or perceived, regarding attorney Worthington's temporary custody of defendant's children and the accidental shooting of attorney Worthington. This Court also finds that defendant made no objection to any real or perceived conflict of interest resulting from attorney Worthington's representation and fails to demonstrate that an actual conflict of interest adversely affected his lawyer's performance. *State v. Walls*, 342 N.C. 1, 463 S.E.2d 738 (1995).

11. This Court finds that this claim is without merit and is denied for the above stated reasons.

CLAIM III

1. In this claim defendant alleges that he received ineffective assistance of counsel as a result of trial counsel's failure to utilize a mental health expert to investigate the availability or usefulness of mental health evidence as mitigating evidence.

2. In evaluating this claim, this court has been guided by the law and precedent governing ineffectiveness claims set forth in detail under the evaluation of Claim I. It is hereby incorporated by reference and need not be repeated.

3. In evaluating defendant's allegations of ineffective assistance of counsel, this Court is not bound by assertions of effectiveness, or lack thereof, made by trial counsel or any other "expert" attorney witness. *See Noland v. French*, 134 F.3d 208 (4th Cir.), *cert. denied*, __ U.S. __, 119 S.Ct. 125, 142 L.Ed.2d 101 (1998), stating:

> Initially, Noland contends that he was not afforded a fair and adequate hearing in state post-conviction because the state court refused to allow an attorney to testify as an expert as to what constitutes the objective standard of reasonable competence for a lawyer trying a death penalty case. We agree with the district court that when an expert witness is not in a better position than the fact finder to render an opinion on a matter, it is not error to exclude that witness' testimony. *See* J.A. at 1353-54. Under North Carolina law, the trial court is the finder of fact in a motion for appropriate relief. *See* N.C. Gen. Stat. § 15A-1413 (1997). Noland's expert was in no better position than the trial court judge, who had tried a number of capital cases, J.A. at 390, to explain the general standard of practice and to assess the adequacy of Noland's trial counsel. Noland was therefore

> not prejudiced in his state court hearing, and is not entitled to remand for further factual development by the district court.

134 F.3d at 217. *See also Beaver v. Thompson*, 93 F.3d 1186, 1191 (4th Cir.) (no abuse of discretion when state court would not permit expert in legal ethics to testify that in his opinion employment of an individual as a part-time Commonwealth's attorney would have been a breach of legal ethics because the Court did not need the assistance of the expert in determining the issue before the court), *cert. denied sub nom*; *Barnes v. Netherland*, 519 U.S. 1021, 117 S.Ct. 553, 136 L.Ed.2d 424 (1996); *Walls v. Bowersox*, 151 F.3d 827, 836 (8th Cir. 1998), (ineffectiveness is a question for the court; counsel saying he is ineffective does not prove ineffectiveness), *cert. denied*, __ U.S. __, 119 S.Ct. 2066, 144 L.Ed.2d 230 (1999); *LaGrand v. Stewart*, 133 F.3d 1253, 1270 n.8 (9th Cir.), (no requirement that expert testimony of outside attorneys be used to determine appropriate standard of care when evaluating ineffective assistance of counsel claims), *cert. denied*, __ U.S. __, 119 S.Ct. 422, 142 L.Ed.2d 343, *reh'g denied*, __ U.S. __, 119 S.Ct. 610, 142 L.Ed.2d 551 (1998); *Middleton v. Evatt*, 77 F.3d 469 (4th Cir.) (unpub.) (Trial counsel's affidavit claiming ineffectiveness appears to be "nothing but a post hoc rationalization intended to defeat imposition of the death penalty. *See Atkins v. Singletary*, 965 F.2d 952, 959-60 (11th Cir. 1992)" [(affidavit of trial counsel tending to demonstrate ineffectiveness of counsel given no substantial weight because ineffectiveness of counsel is a question to be decided by the court)].), *cert. denied sub. nom., Middleton v. Moore*, 519 U.S. 876,

117 S.Ct. 199, 136 L.Ed.2d 135, *reh'g denied*, 519 U.S. 988, 117 S.Ct. 449, 136 L.Ed.2d 345 (1996); *Bonin v. Calderon*, 59 F.3d 815, 838 (9th Cir. 1995) (matters of law are for court's determination and inappropriate for expert opinion), *cert. denied*, 516 U.S. 1051, 116 S.Ct. 718, 133 L. Ed. 2d 671, *reh'g denied*, 516 U.S. 1142, 116 S.Ct. 977, 133 L. Ed. 2d 897 (1996); *State v. Mancuso*, 321 N.C. 464, 468-69, 364 S.E.2d 359, 362-63 (1988) (trial court did not abuse discretion by refusing to admit testimony of an assistant attorney general concerning involuntarily commitment procedures at mental health facilities); *Smith v. Childs*, 112 N.C. App. 672, 679-80, 437 S.E.2d 500, 506 (1993) (reversible error when trial court permitted an attorney to testify as to legal conclusions; attorney not allowed to either interpret the law or to testify as to the legal effect of particular facts). It is the function of this Court to determine whether the legal standard of *Strickland* is satisfied in defendant's case.

4. The test for prejudice established in *Strickland* is that "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698. The test for prejudice is not conducted in an evidentiary vacuum. The overall strengths and weakness of the State's case are critical factors in the examination for prejudice resulting from any alleged professional errors on trial counsel's part. As *Strickland* points out ". . . a verdict or conclusion only weakly supported by the record is

more likely to have been affected by errors than one with overwhelming support." *Strickland*, 466 U.S. 668, 696, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674, 699.

5. At the evidentiary hearing, defendant presented the testimony of Dr. James E. Bellard, M.D, a psychiatrist in private practice in Raleigh. Dr. Bellard met with the defendant on two occasions in January 1999, for a total of four hours. Dr. Bellard also reviewed the trial testimony of the defendant and Dr. Gridley and reviewed the report of Dr. Patricio Lara, a psychiatrist from Dorothea Dix Hospital who examined the defendant shortly after the murder of Rosalyn Gray. Dr. Bellard rendered the opinion that at the time of the murder of Rosalyn Gray, the defendant suffered from Paranoid Personality Disorder. Dr. Bellard also rendered the opinion that at the time of the murder of Rosalyn Gray, the defendant was under emotional or mental stress. It was the opinion of Dr. Bellard that these two conditions impaired his ability to calmly plan and deal with events in a rational calm manner. (EHT pp. 155-58).

6. The Court finds that it is significant that as the State underscored, Dr. Bellard's contact with defendant was six years after the murder. Furthermore, Dr. Bellard had not reviewed the trial testimony which set forth defendant's actions and conduct in the days and months leading up to the murder of Rosalyn Gray as well as the friends, relatives, and associates of defendant. (EHT pp. 160-172). The testimony or observations of individuals with knowledge of defendant's behavior and personality during defendant's late adolescence and

early adulthood is important to making the diagnosis arrived at by Dr. Bellard. This is noted by the manual Dr. Bellard himself utilizes, the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV). (EHT 166-67).

7. This court finds that the record details overwhelming evidence that for months prior to her murder, defendant had stalked, tormented and abused Rosyln Gray. It was undisputed that defendant followed his victim utilizing disguises, such as a wig purchased by defendant's dental assistant, and borrowing different vehicles. Defendant had closed bank accounts and shifted funds to cut off access to these resources from Roslyn Gray. Defendant also concocted a false alibi for the time of the murder, using his children as part of the planned deception. Such evidence goes to defendant's ability to think and plan. Dr. Bellard agreed that such conduct showed some ability to plan. (EHT pp. 170-72).

8. This Court notes that defendant's theory at trial was that the murder was an "accident" which occurred when he "instinctively" pushed a gun that was pointed at him away. Defendant testified at trial consistent with this defense theory. Injecting mental health testimony of a lack of or diminished mental responsibility is inconsistent with defendant's "accident" defense. (EHT pp. 38-40, 129). Although nothing prevents defendant from offering alternative theories, this court does not find it to be unreasonable performance to decline to do so.

9. This Court finds that the record contains persuasive testimony from State and defense witnesses that defendant was calm, in control, and conducted himself normally as a person in "their right mind" throughout the period of the contentious divorce proceedings and up to the murder itself: Dr. Marshal J. Barker, the victim's physician (Vol. 6, Tp. 2242); Ms. Aloise Burian, the victim's secretary (Vol. 7, Tp. 2364); Mr. Curtis S. Smith, Defendant and victim's tax preparer (Vol. 7, Tp. 2397); Mr. Donald R. Hollowell, defendant's best friend (Vol. 9, Tpp. 3114, 3179); Rob Gray, III, defendant's son (Vol. 9, Tp. 3352); Ms. Lisa Hill, defendant's employee (Vol. 10, Tp. 3523); finally, defendant himself (Vol. 11, Tpp. 378 1-83). These witnesses offered first-hand observation and experience with defendant in the days and months preceding the murder of defendant's wife.

10. Defendant's trial counsel, attorneys Worthington and Wooten, both testified at the evidentiary hearing that defendant was mentally coherent and capable of cooperating and assisting in his trial preparation. Attorney Worthington stated that he would not have allowed the defendant to be interviewed by the police on the night of the murder if he had questions about his mental capacity. (EHT p. 106). Attorney Wooten stated that he found the defendant to be intelligent and had no problems communicating with the defendant regarding his case. (EHT p. 137). Attorney Wooten opined that he did not see anything striking in the defendant being described as depressed in the weeks immediately following the murder of Rosalyn Gray. (EHT p. 137).

11. Ms. Yvonne Taylor testified at the evidentiary hearing regarding her contact with and observations of defendant. Ms. Taylor observed defendant to be alert, coherent, and fully in control of his faculties both before the murder and after. (EHT pp. 177-78).

12. The Court finds that at the time of his trial the defendant was not indigent or mentally incompetent. (EHT pp. 80, 103, 137, 158) Attorneys Worthington and Wooten were not appointed counsel but had been specifically retained and paid by defendant. Attorney Worthington testified that he suggested to the defendant that an independent psychiatric exam be conducted at defense expense. (EHT p. 78). Attorney Worthington did not necessarily intend to utilize psychiatric evidence but expressed a desire to have an independent psychiatrist on standby. (EHT p. 78).

13. The Court finds that defendant authorized funds for expert assistance but refused to authorize the expenditure of any funds for further psychiatric examinations. (EHT pp. 78-80). Attorney Worthington was not obligated to expend his own funds or resources, or request funds from the court when defendant was not indigent, on any independent psychiatric examinations in light of the defendant's expressed resistance to any such action. (EHT p. 80). The failure of attorney Worthington to fund further psychiatric examinations out of his own funds or to request funds from the Court when defendant was not indigent or mentally incompetent fails to satisfy the performance prong of the *Strickland* ineffectiveness standard.

14. The Court finds that defendant has failed to demonstrate prejudice to satisfy the second prong of *Strickland*. Defendant has not demonstrated to the satisfaction of this Court that had trial counsel presented mental health evidence that there is a reasonable probability that the outcome of defendant's trial would have been different. *Strickland*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698.

15. At defendant's trial the statutory mitigating circumstance that "The capital felony was committed while the Defendant was under the influence of mental or emotional distress" and the nonstatutory mitigating circumstance that "The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired" were submitted to the jury by the trial court. (ROA p. 283, 284). The trial court found that attorneys Worthington and Wooten had presented sufficient evidence to justify the submission of the mitigating circumstances to defendant's jury. (EHT pp. 40-41).

16. The Court finds that the opinion of attorney Ashcroft at the evidentiary hearing that medical testimony may have bolstered the evidence of defendant's stressful circumstances at the time of the murder of Rosalyn Gray and made a difference in the jury's findings is speculative. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test..." *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067, 80 L.Ed.2d at 697. Even with the proffered

medical testimony this Court finds it to be a leap of speculation that the jury would necessarily have found the existence of the statutory and nonstatutory mitigating circumstances. It is a further leap of speculation that there is a reasonable probability that the result of defendant's trial would have been any different.

17. This Court notes that as pointed out in ¶ 9. Above, the State presented extensive evidence that defendant was in full control of his mental faculties, reasoning and judgement abilities during the time frame of the murder of Roslyn Gray.

18. The Court finds that this claim is without merit and it is denied for the reasons stated above. Defendant has failed to satisfy either the performance or the prejudice prong of the *Strickland* standard.

CLAIM IV

1. In this claim defendant alleges that he was denied the effective assistance of counsel due to various trial errors.

2. In evaluating this claim, this Court has been guided by the law and precedent governing ineffectiveness claims set forth in detail under the evaluation of Claim I. It is hereby incorporated by reference and need not be repeated.

3. This Court finds that this claim is procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(2) and (3) (1996), since the issues underlying this claim, were

raised upon direct appeal to the Supreme Court of North Carolina and were decided contrary to defendant's position. Defendant was also in a position to adequately raise the ground upon which he bases this claim but did not do so. Additionally, the defendant has failed to show good cause and a demonstration of actual prejudice, or that a fundamental miscarriage of justice will result in order to excuse the application of the procedural default rules. N.C.G.S. § 15A-1419(b)(l) and (2).

4. Each of the issues which underlie this claim were assigned as error in the Record on Appeal, addressed as issues in defendant's direct appeal, and subsequently decided contrary to defendant by the North Carolina Supreme Court: trial court's instruction on flight (Assignment of Error #67, Issue V in defendant's direct appeal brief, *Gray*, 347 N.C. at 168, 491 S.E.2d at 547); prosecutor's argument on flight (Assignment of Error #66, Issue XV in defendant's direct appeal brief, *Gray*, 347 N.C.at 168, 491 S.E.2d at 547); testimony of Aloise Burian (Assignment of Error #39, Issue XII in defendant's direct appeal brief, *Gray*, 347 N.C. at 174-76, 491 S.E.2d at 551-52); testimony of Dr. Marshall Barker (Assignment of Error #37, Issue XIII in defendant's direct appeal brief, *Gray*, 347 N.C. at 174-76, 491 S.E.2d at 551-52). Defendant can not avoid the ruling of the North Carolina Supreme Court on these issues by the device of restyling the claims in ineffectiveness garb. Defendant was in a position to raise these issues as ineffective assistance of counsel but did not do so. Thus, this claim is procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(2) and (3).

5. This Court finds that this claim has no merit. Assuming *arguendo* that trial counsel's failure to raise timely objections to the complained of evidence and instruction was unreasonable, defendant can not establish prejudice under *Strickland*'s second prong. The United States Supreme Court decision in *Strickland* states:

> Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. 668, 687, 113 S.Ct. 2052, 2064, 80 L.Ed.2d at 693.

6. In reviewing the entire record of trial, defendant has not shown that his trial, and its result, was anything but fundamentally fair and reliable. The North Carolina Supreme Court examined each of the complained of areas under a "plain error" analysis. The test for "plain error" is set forth in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983):

> [T]he plain error rule ... is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error

> has "'resulted in a miscarriage of justice or in the denial to appellant of a fair trial'" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.1982)

State v. Odom, 307 N.C. at 660 300 S.E.2d at 378. In examining the jury instruction for "plain error", the North Carolina Supreme Court ". . . must examine the entire record and determine if the error had a probable impact on the jury's finding of guilt." *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79. This standard of review and examination applies to the other complained of issues. *State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 806-07 (1983) (Although *Odom* applied to jury instructions the Court held it will also apply the "plain error" rule to the admission of evidence). This Court finds that in failing to find "plain error" in any of the complained of issues, the North Carolina Supreme Court finds *a fortiori* that defendant received a fundamentally fair trial whose results are reliable.

7. The defendant has not made the required showing of prejudice required under *Strickland*. Counsels arguments to the jury were prefaced with the admonishment that their arguments were not evidence and that the law would be given them by the Trial Court. (Vol. 12, Tpp. 4024-25). The Trial Court's instruction was not an incorrect statement of the law. *State v. Gray*, 347 N. C. 143, 168, 491 S.E.2d 538, 547.

The complained of testimony of Aloise Burian was similar in nature and cumulative to testimony that had been received from Wanda Winborne, Sue Gregg Camaioni, and Betty Lawson. Any possible negative effect resulting from the testimony of Dr. Barker about the children screaming was overshadowed by the properly admitted testimony of what allegedly made them scream; the attempted sexual assault and choking of the victim by defendant. Finally, Dr. Barker's testimony regarding the marriage counselor was similar to, and cumulative with, the properly admitted testimony concerning defendant's calls and visits to Dr Barker's office and the effect on his staff. *Nguyen v. Reynolds*, 131 F.3d 1340 (10th Cir. 1997) (Counsel's failure to object to inadmissible testimony did not deprive defendant of a fair trial. The evidence of guilt was substantial, if not overwhelming. Thus, the testimony was too insignificant to have altered the outcome of the trial. Finally, none of the prosecutor's remarks during closing argument were so egregious that they deprived defendant of a fair trial.), *cert. denied*, __ U.S. __, 119 S.Ct. 128, 142 L.Ed.2d 103 (1998).

8. This Court finds that the transcript demonstrates that defendant received a fundamentally fair trial, one whose results are just and reliable. Defendant fails to show that were it not for counsel's alleged errors, there is a reasonable probability that the result of his trial would have been different. Defendant fails to undermine confidence in the outcome of his trial. *Strickland*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d at 698.

9. Defendant has failed to make the showing of good cause and actual prejudice as required by N.C.G.S. §§ 15A-1419(b) through (d) (1996). This claim is procedurally barred.

10. This Court finds that this claim is without merit and is denied for the reasons stated above. The alleged errors of trial counsel during the course of defendant's trial do not render the result of defendant's trial unreliable. Defendant can not establish prejudice to satisfy the second prong of the *Strickland* standard.

CLAIM V

1. This claim alleges a violation of defendant's rights under the Fifth, Sixth, and Fourteenth Amendments of the Federal Constitution due to the State's alleged failure to disclose a statement made to Kinston Police by Jill Kutsch. In the statement made by Jill Kutsch, and allegedly suppressed by the State, Ms. Kutsch states that the victim, Roslyn Gray, had shown Ms. Kutsch a gun that she was thinking of buying. Defendant asserts that this statement would support or corroborate his claim that his victim had a gun on her person on the night of her murder. In his MAR, defendant claims that the only evidence presented to the jury at his trial that the victim had a gun came from defendant's own testimony.

2. Defendant's claim is one of a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *Brady* provides no bright line rules as to what must be turned over to the defense, only that:

> the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Brady, 373 U.S. at 87, 83 S.Ct. at 1196-97, 10 L.Ed.2d at 218.

3. In evaluating defendant's claim, the following general principles serve as guidance: *State v. Strickland*, 346 N.C. 443, 488 S.E.2d 194 (1997), *cert. denied*, __ U.S. __, 118 S.Ct. 858, 139 L.Ed.2d 757 (1998), stating:

> In [*Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)], the United States Supreme Court held that suppression by the prosecution of favorable evidence which is material to the guilt or punishment of a defendant violates due process. *Id.* Favorable evidence is material if there is a "reasonable probability" that its disclosure to the defense would result in a different outcome in the jury's deliberation. *Kyles v. Whitley*, 514 U.S. 419, 419, 115 S.Ct. 1555, 1558, 131 L.Ed.2d 490, 496 (1995).

346 N.C. at 456, 488 S.E.2d at 202.

State v. Kilpatrick, 343 N.C. 466, 471 S.E.2d 624 (1996), stating:

> To prevail under *Brady* a "defendant must first show that evidence favorable to the accused was actually suppressed and that the suppressed evidence was material either to guilt or punishment such that there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different." *Smith*, 337 N.C. at 664, 447 S.E.2d at 379.

343 N.C. at 471, 471 S.E.2d at 627-38. *Accord State v. Smith*, 337 N.C. 658, 447 S.E.2d 376 (1994); *United States v. Ellis*, 121 F.3d 908, 916 (4th Cir. 1997) (failure to disclose content of F.B.I. 302 file containing prior inconsistent statements of witness "provided only cumulative impeachment of [witness's] trial testimony and do not rise to a level that undermines our confidence in the verdict.") *cert. denied*, __ U.S. __, 118 S.Ct. 738, 139 L.Ed.2d 674 (1998); *Rector v. Johnson*, 120 F.3d 551 (5th Cir. 1997), *cert. denied*, __ U.S. __, 118 S.Ct. 1061, 140 L.Ed.2d 122 (1998), stating:

> [T]o state a *Brady* claim, defendant must demonstrate (1) the prosecution suppressed evidence, (2) the evidence was favorable, (3) the evidence was material to either guilt or punishment, *and* (4) discovery of the allegedly favorable evidence was not the result of a lack of due diligence. (Citations omitted). The State has no obligation to point the defense toward potentially exculpatory evidence when that evidence is either in the possession of the defendant or can be discovered by exercising due diligence." (Citations omitted). Nor is the

> State obligated under *Brady* to disclose evidence that is available from other sources. (Citation omitted).

120 F.3d at 558-59.

State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (1994), *reconsideration denied*, 339 N.C. 741, 457 S.E.2d 304 (1995), stating:

> In determining whether the suppression of certain information was violative of a defendant's right to due process, the focus should be on the effect of the nondisclosure on the outcome of the trial, not on the impact of the undisclosed evidence on the defendant's ability to prepare for trial. [*United States v. Agurs*, 427 U.S. 97, 109, 96 S.Ct. 2392, 2400, 49 L.Ed.2d 342, 353 (1976)]. Because the evidence withheld must be material, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Id.*

339 N.C. at 657, 457 S.E.2d at 296.

3. This Court finds that Jill Kutsch's statement that Roslyn Gray showed her a gun she was thinking about purchasing is not material in the *Brady* sense. There is no reasonable probability that its disclosure to the defense would have resulted in a different outcome in the jury's deliberation. *Kyles v. Whitley*,

514 U.S. 419, 419, 115 S.Ct. 1555, 1558, 131 L.Ed.2d 490, 496 (1995).

4. This Court finds that defendant's underlying premise, that the only evidence presented to the jury at his trial to the effect that his victim had a gun on her person at the time of her murder came from defendant's own testimony, is not correct. Debbie Ryals testified for the State. Upon cross-examination of Ms. Ryals the following information was elicited by the defense:

Q: DID SHE CONFIDE IN YOU HER STATE OF MIND OR INTENTION TO PURCHASE A GUN?

A: YES, SIR.

Q: AND WHAT DID SHE STATE TO YOU?

A: SHE SAID THAT SHE HAD PURCHASED A PISTOL AND THAT A FRIEND OF HERS WAS GOING TO HELP HER LEARN HOW TO USE IT TO PROTECT HERSELF.

(TVol. 7, Tp. 2461).

In closing argument, defendant specifically referred to the testimony of Ms. Ryals, that Roslyn Gray had a gun, "A gun that she said to Debbie Ryals that she had gotten and she had learned how to use. Her friend had shown her how to use it." (Vol. 12, Tp. 4112).

5. Assuming *arguendo*, that the December 9, 1992, statement was not provided to defendant, there

is no "reasonable probability" that its disclosure would result in a different outcome in the jury's deliberations. *Strickland*, 346 N.C. at 456, 488 S.E.2d at 202; *Kilpatrick*, 343 NC. at 471, 471 S.E.2d at 627-28. Attorney Worthington testified that although having the statement of Jill Kutsch may have changed or affected his trial preparation, in his opinion having the statement of Jill Kutsch would not have made a material effect on the outcome of defendant's trial. (EHT pp. 60-61). The focus of any nondisclosure is on the outcome at trial and not on defendant's trial preparation.

6. The substance of defendant's complaint in this claim is that he did not have evidence that Roslyn Gray was thinking about purchasing a weapon. This Court finds that defendant presented to the jury evidence that Roslyn Gray had acted on her thoughts and purchased a pistol. Defendant's assertion that the only evidence presented to the jury regarding Roslyn Gray's possession of a weapon came from his testimony is false and the entire premise for this claim dissolves.

7. The statement of Ms. Kutsch is at best cumulative and not material in the constitutional sense of *Brady*. The focus of any nondisclosure is on the outcome at trial and not on defendant's trial preparation. The mere possibility that an item of information might have helped the defense or might have affected the outcome does not establish materiality in the constitutional sense. *Hunt*, 339 N.C. at 657, 457 S.E.2d at 296.

8. Attorney Worthington testified that the District Attorney 's Office followed an open discovery policy in defendant's case in which attorney Worthington had access to the District Attorney's case file regarding defendant. (EHT pp. 56-57). Attorney Worthington testified that during his review of the District Attorney's file in defendant's case he did not see the notes on the interview of Jill Kutseh wherein she describes Rosalyn Gray's intention to purchase a gun. (EHT p. 59).

9. Kinston Police Detective Carlton Neil Flowers testified that he was the lead investigator in defendant's case. (EHT pp. 198-99). Detective Flowers testified that the statement of Jill Kutsch regarding the intention of Rosalyn Gray to purchase a gun was placed in the investigative report which was then provided to the District Attorney's Office. (EHT pp. 199-204).

10. This Court also finds that Ms. Kutsch was available to be interviewed and called as a witness by defendant. Defendant had it within his means to discover the statement of Ms. Kutsch by the simple expedient of interviewing her and thus no "suppression" of evidence under *Brady* occurred. The State has no duty to point the defense toward evidence when the evidence can be discovered by exercising due diligence. The State is also not obligated under *Brady* to disclose evidence that is available from other sources, in this instance Ms. Ryals, and which defendant did in fact present to the jury.

8. This Court finds that this claim is without merit and is denied for the reasons stated above.

CLAIM VI

1. In this claim, defendant recasts the factual background of the previous claim, Claim V, as one of ineffective assistance of counsel. Defendant alleges that if in fact the statement of Jill Kutsch was made available to trial counsel, then the failure to interview and call Ms. Kutsch as a witness was not objectively reasonable performance per the first prong of *Strickland*.

2. The legal authority pertaining to ineffective assistance of counsel set forth in previous claims is applicable to this claim and is incorporated by reference. It need not be repeated. Additionally, the factual background set forth in the analysis of Claim V relating to the statement of Jill Kutsch and Debbie Ryals testimony regarding the victim's alleged possession of a pistol is also applicable to this claim and is incorporated by reference.

3. As explained in the analysis of Claim V, this Court finds that defendant's assertion that the only evidence that his victim may have been in possession of a gun at the time of her murder came from his own testimony is not correct. Contrary to defendant's assertion, there was evidence presented to the jury that Roslyn Gray may have possessed a pistol which was elicited from a source other than defendant. Jill Kutsch could only testify that Roslyn Gray was "thinking" about buying a gun. Ms. Ryal gives

defendant the reality of the victim not only purchasing a pistol, but learning to use it. This Court finds that it is not objectively unreasonable performance to forego pursuing "possibilities" with witnesses such as Ms. Kutsch when Ms. Ryals gives defendant the testimony he seeks.

4. This Court finds that attorney Worthington expressed a logical and legitimate reason for not calling Jill Kutsch as a witness. Although Jill Kutsch may have offered cumulative corroboration to Debbie Ryal's testimony regarding Rosalyn Gray's ownership of a handgun, attorney Worthington was also aware that Jill Kutsch was a friend of Rosalyn Gray and a hostile witness. Jill Kutsch would have potentially offered further testimony regarding Rosalyn Gray's fear of defendant and the attacks upon the person of Roslyn Gray by defendant which motivated her fear. (EHT pp. 61, 94).

5. Assuming *arguendo* that it is unreasonable not to interview or call Ms. Kutsch, this Court finds that defendant fails to show any prejudice that satisfies the second prong of *Strickland*. The alleged harm to his case that defendant premises this claim upon evaporates with the testimony of Ms. Ryals. This Court notes that defendant's self-serving testimony remains the sole evidence that Roslyn Gray had a weapon in her possession at the time of her murder. Neither the testimony of Ms. Ryals or the statement of Ms. Kutsch provide defendant with evidence of possession of a weapon on the person of Roslyn Gray at the time of her murder by defendant. Ms. Ryals testimony replaces, and with more specificity, the

statement of Ms. Kutsch in the area of whether Rosyln Gray may have ever possessed a weapon. Defendant completely fails to show prejudice sufficient to satisfy the second prong of *Strickland*.

6. This Court finds that the testimony of Ms. Ryals prevents defendant from making any credible claim that the result of his trial is unreliable and would have been different with the statement of Ms. Kutsch. *Strickland*, 446 U.S. 668, 687, 694, 104 S.Ct. 2052, 2064, 2068, 80 L.Ed.2d at 693, 698.

6. This Court finds that this claim is without merit and is denied for the reasons stated above.

CLAIM VII

1. In this claim, defendant alleges that he received ineffective assistance from his appellate counsel. Defendant contends that appellate counsel was ineffective in not raising on direct appeal the issues of ineffective assistance of trial counsel and conflict of interest that are contained in Claims I-IV, and VI of his MAR.

2. This Court finds that had any of these claim been properly preserved and presented for appellate review, they would not have raised any "dead-bang" winners that would require reversal of defendant's conviction and/or sentence. *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995), states the following regarding ineffective assistance of appellate counsel claims:

> Failure to raise an issue that is without merit "does not constitute constitutionally ineffective assistance of counsel," (citation omitted), because the Sixth Amendment does not require an attorney to raise every nonfrivolous issue on appeal. (Citation omitted). Thus, counsel frequently will "winnow out" weaker claims in order to focus effectively on those more likely to prevail. (Citations omitted). However, "an appellate advocate may deliver deficient performance and prejudice a defendant by omitting a 'dead-bang winner,' even though counsel may have presented strong but unsuccessful claims on appeal." (Citation omitted).

54 F.3d at 1515. In a footnote to the above quotation, the Court stated: "While we have not defined the phrase "dead-bang winner" with precision, we have concluded that it is an issue which is obvious from the trial record and one which probably would have resulted in a reversal on appeal. *Cook*, 45 F.3d at 394-95." 54 F.3d at 1514 n. 13. *Accord*, *Tapia v. Tansy*, 926 F.2d 1554, 1564 (10th Cir. 1991) ("Winnowing out weaker arguments" is not a constitutionally deficient practice and, indeed, is the hallmark of effective advocacy. (Citations to United States Supreme Court decisions omitted).") *cert. denied*, 502 U.S. 835, 112 S.Ct. 115, 116 L.Ed.2d 84 (1991); *Laaman v. United States*, 973 F.2d 107, 113 (2d Cir. 1992) (appellate counsel not ineffective for failing to litigate Fourth Amendment claim because evidence would not have been suppressed), *cert. denied*, 507 U.S. 954, 113 S.Ct. 1368, 122 L.Ed.2d 746 (1993);

United States v. Patten, 40 F.3d 774, 776-77 (5th Cir. 1994) (appellate counsel not ineffective for failing to appeal denial of defendant's motion for sentencing hearing, since appeal was without merit), *cert. denied*, 515 U.S. 1132, 115 S.Ct. 2558, 132 L.Ed.2d 811 (1995); *Moore v. Carlton*, 74 F.3d 689, 693 (6th Cir.) (appellate counsel not ineffective for failing to file portion of record on direct appeal because of lack of evidence that such filing would have changed the outcome of the case), *cert. denied*, 516 U.S. 1183, 116 S.Ct. 1287, 134 L.Ed.2d 231 (1996); *Heath v. Jones*, 941 F.2d 1126, 1134, 1136-37 (11th Cir. 1991) (appellate counsel not ineffective despite lack of reasonable strategic reason for choosing and poorly briefing only one issue on capital appeal because poor performance was not prejudicial when neglected claims had no reasonable probability of success on appeal), *cert. denied*, 502 U.S. 1077, 112 S.Ct. 981, 117 L. Ed. 2d 144 (1992). *See also Evans v. Thompson*, 881 F.2d 117, 124 (4th Cir. 1989), *cert. denied*, 497 U.S. 1010, 110 S.Ct. 3255, 111 L.Ed.2d 764 (1990); *Smith v. South Carolina*, 882 F.2d 895 (4th Cir. 1989), *cert. denied*, 493 U.S. 1046, 110 S.Ct. 843, 107 L.Ed.2d 838 (1990); *Griffin v. Aiken*, 775 F.2d 1226 (4th Cir. 1985), *cert. denied*, 478 U.S. 1007, 106 S.Ct. 3301, 92 L.Ed.2d 715 (1986); *Green v. French*, 978 F. Supp. 242, 256 (E.D.N.C. 1997) (J. Britt) (rejecting a claim of ineffective assistance of appellate counsel) *aff'd*, 143 F.3d 865 (4th cir. 1998), *cert. denied*, __ U.S. __, 119 S.Ct. 844, 142 L.Ed.2d 698 (1999), stating:

> To constitute effective assistance of counsel, an attorney is not obligated to argue every possible ground to the fullest extent possible

> especially one that is likely futile. *See Garrett v. United States*, 78 F.3d 1296, 1303 n. 11 (8th Cir.), *cert. denied*, __U.S. __, 117 S.Ct. 374, 136 L.Ed.2d 264 (1996). In fact, such a strategy would likely be counterproductive and dilute the party's more persuasive arguments. Accordingly, Green cannot satisfy either *Strickland* prong.

978 F. Supp. at 256.

3. The ineffectiveness standard established for performance of trial counsel under *Strickland* also applies to evaluating appellate counsel. *Mu'Min v. Pruett*, 125 F.3d 192, 198 (4th Cir.), *cert. denied*, __ U.S. __, 118 S.Ct. 438, 139 L.Ed.2d 337 (1997). Appellate counsel is entitled to the presumption of competence that *Strickland* affords trial counsel. To establish prejudice defendant must show that the appeal would likely be successful. *Smith v. Dixon*, 14 F.3d 956, 982 (4th Cir.), *cert. denied*, 513 U.S. 841, 115 S.Ct. 129, 130 L.Ed.2d 72 (1994).

4. The United States Supreme court recognizes that appellate counsel is neither required or expected to raise every nonfrivolous issue on appeal. "There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." *Jones v. Barnes*, 463 U.S. 745, 752, 103 S.Ct. 3308, 3313, 77 L.Ed.2d 987, 994 (1983). "[W]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from evidence of incompetence, is the hallmark of effective advocacy."

Smith v. Murray, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434, 445 (1986) (quoting *Jones*, 463 U.S. at 751-52, 103 S.Ct. at 3312-13, 77 L.Ed.2d at 994).

5. This Court has previously addressed in this Order, the merits of each claim underlying the issues that appellate counsel is alleged to have been ineffective in failing to raise. The Courts analysis of the substance of these Claims, Claims I-IV, and V, is hereby incorporated by reference and will not be repeated.

6. At the evidentiary hearing the defendant and the State stipulated that had attorney David Belser, defendant's counsel on direct appeal, been called as a witness he would testify in accordance with his affidavit submitted with defendant's Motion for Appropriate Relief. Attorney Belser's affidavit stated in substance that he was unable to determine from matters of record whether attorney Worthington was a material witness who should have withdrawn as counsel and that he was unable to determine if the defendant had waived any conflict of interest as a result of being represented by attorney Worthington. The Court finds that it is not necessary to determine if attorney Belser was presented with sufficient evidence of record to raise the complained of issues of ineffective assistance of counsel and conflict of interest on direct appeal. The Court can decide this claim by moving directly to the second prong of the *Strickland* standard and examining for prejudice.

7. This Court has found that defendant's trial counsel was not operating under any conflict of interest, real or imagined. Defendant has not demonstrated that trial counsel's performance was adversely affected by any conflict. There is no likelihood that the conflict of interest claims would have resulted in reversal on appeal. This Court finds that defendant can not prevail on any of the underlying claims themselves, he can not show any prejudice as a result of his appellate counsel not raising claims that are meritless.

8. This Court has found that defendant's trial counsel did not render ineffective assistance of counsel. In each allegation of ineffective assistance contained in defendant's MAR, this Court has determined that trial counsel's performance was not objectively unreasonable and that defendant has not shown prejudice from the alleged failings of trial counsel. Defendant has not shown the probability of a different outcome of his trial. The result of defendant's trial is fundamentally fair and reliable. *Strickland*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d at 693. Defendant fails to establish any prejudice from the failure of appellate counsel to raise meritless claims.

9. This Court has examined the direct appeal brief filed by defendant's appellate counsel. Appellate counsel raised and briefed thirty-one assignments of error and fourteen additional issues as "preservation issues". The brief itself exceeded three hundred pages. This Court finds that defendant's direct appeal was extensive, exhaustive, and thorough.

10. This Court finds that defendant can not prevail on the merits of the underlying claims themselves and therefore his appellate counsel can not be deemed ineffective for failing to raise derivative claims that are nonexistent or meritless. None of these claims amount to "dead-bang winners" that would result in a different outcome on appeal. Defendant fails to establish prejudice under the second prong of *Strickland*.

11. This Court finds that this claim is without merit and is denied for the reasons stated above.

CLAIM VIII

1. In this claim defendant again uses the same factual allegations set forth in Claims 1, III, IV, VI, and VII of his MAR and alleges that they constitute an Eighth Amendment violation. Defendant alleges that because he received ineffective assistance of counsel he is subject to cruel and unusual punishment. Defendant also contends that defendants charged with murder under similar factual circumstances are not ordinarily subject to the death penalty and that the N.C.G.S. §15A-2000(e)(7) and (8) aggravating circumstances are not ordinarily applied in such circumstances. Finally defendant alleges that he was not adequately informed of the aggravating factors upon which the State intended to rely during sentencing.

2. This Court has dealt with defendant's allegations of ineffective assistance of counsel in detail in this Order. The Court's analysis to the allegations

of ineffective assistance of counsel asserted in Claims I, III, IV, VI, and VII are incorporated by reference and need not be repeated. Defendant is merely attempting to revisit the same issues under the guise of a different name. Claim IV is procedurally barred pursuant to N.C.G.S. §15A-1419(a) (2) and (3) and its derivative restatement under this claim is also procedurally barred. Defendant has failed to make the showing of good cause and actual prejudice as required by N.C.G.S. §§ 15A-1419(b) through (d) (1996).

3. This Court finds that the aspects of this claim alleging ineffective assistance of counsel and appellate counsel resulting in an Eight Amendment violation are without merit. This Court has previously determined in this Order that defendant's allegations of ineffective assistance of counsel and appellate counsel are without merit. Defendant has not shown that trial counsel's representation was objectively unreasonable. This Court has determined that defendant has not shown any prejudice resulting from any alleged failings of trial or appellate counsel sufficient to satisfy *Strickland*'s second prong. The allegations which form the underlying basis and foundation for this claim have no merit and thus this Court finds defendant's claim of an Eight Amendment violation to be without merit and is denied.

4. This Court finds that defendant's allegation that his sentence of death was imposed arbitrarily is procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(2). Defendant has failed to make the showing of good cause and actual prejudice as required by N.C.G.S. §§ 15A-1419(b) through (d) (1996). The

applicability of the aggravating circumstances set forth in N.C.G.S. § 15A-2000(e)(7) and (8) to the facts and circumstances of defendant's case were raised upon direct appeal. The North Carolina Supreme Court ruled that the submission of the (e)(7) and (e)(8) aggravating circumstances to the jury for consideration were sufficiently supported by the evidence and were applicable to the circumstances of defendant's crime. *State v. Gray*, 347 N.C. at 182-83, 362 S.E.2d at 556. The North Carolina Supreme Court also specifically found that defendant's sentence of death was not imposed arbitrarily and was not disproportionate to the penalties imposed in similar cases, considering ". . . both the crime and defendant." *State v. Gray*, 323 N.C. 143, 190, 372 S.E.2d 491, 560.

5. The allegation that defendant's sentence of death was imposed arbitrarily is also without merit. Defendant is required to support this allegation in his MAR with more than his mere assertion of fact. N.C.G.S. §15A-1420(b)(1). Defendant presented no evidence, cites to no authority, and provides no argument, persuasive or otherwise, that the cold-blooded shooting of one's wife is somehow a more palatable murder, warranting lesser sanctions, than the murder of a stranger or mere acquaintance. The fact that Roslyn Gray's murderer was her husband does not relegate her to a "second-class" victim.

6. This Court finds that defendant's allegation that he was entitled to be notified of the aggravating circumstances that the State would rely upon in seeking the death penalty is procedurally barred pursuant to N.C.G.S. §15A-1419(a) (2). Defendant has

failed to make the showing of good cause and actual prejudice as required by N.C.G.S. §§ 15A-1419(b) through (d) (1996). Upon direct appeal defendant presented this claim to the Supreme Court of North Carolina under "PRESERVATION ISSUES" as Claim XXXVI. (Defendant's Direct Appeal Brief, pp. xii, 293). The North Carolina Supreme Court specifically overruled this aspect of this claim, along with all of the other "Preservation Issues". *State v. Gray*, 323 N.C. 143, 190, 372 S.E.2d 491, 560.

7. This Court finds that this aspect of the claim has no merit. A trial court may not require the State to declare the aggravating circumstances on which it will rely at the sentencing phase. *State v. Holden*, 321 N.C. 125, 153, 362 S.E.2d 513, 531 (1987), *cert. denied*, 486 U.S. 1061, 108 S.Ct. 2835, 100 L.Ed.2d 935 (1988). In addition, "[A] defendant is not constitutionally entitled to an enumeration of aggravating circumstances to be used against him; statutory notice as contained in N.C.G.S. § 15A-2000(e) is sufficient." *State v. McLaughlin*, 323 N.C. 68, 84, 372 S.E.2d 49, 61 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 110 S.Ct. 1463, 108 L.Ed.2d 601 (1990).

8. This Court finds that for the above stated reasons, aspects of this claim are procedurally barred pursuant to N.C.G.S. § 15A-1419(a) (2), and that this entire claim is without merit and is denied. The quality of representation of trial counsel did not result in an Eighth Amendment violation, the death penalty was not imposed arbitrarily and was not disproportionate to the offense. Finally, defendant was not entitled to have the State declare which

aggravating circumstances upon which it would rely during sentencing.

CONCLUSION

1. Defendant's Motion For Appropriate Relief is denied.

2. The Clerk of Court is ORDERED to provide a copy of this ORDER to the District Attorney, each post-conviction counsel, and the Assistant Attorney General representing the State.

SO ORDERED, this 1st day of December, 2000.

/s/
Napoleon B. Barefoot
Superior Court Judge, Presiding

FILED: July 28, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-29
(5: 02-hc-00335-BO)

WILLIAM ROBERT GRAY, JR.
Petitioner - Appellant

v.

GERALD J. BRANKER, Warden, Central Prison, Raleigh, North Carolina
Respondent - Appellee

ORDER

The Court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition for rehearing en banc.

Entered at the direction of Judge Michael with the concurrence of Judge Gregory. Judge Duncan voted to grant panel rehearing.

For the Court

/s/ Patricia S. Connor, Clerk